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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 403.

MISSISSIPPI POWER & LIGHT COMPANY, MISSISSIPPI MUNICIPAL ASSOCIATION, AND CITY OF CLINTON,
Appellants,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

MISSISSIPPI POWER & LIGHT COMPANY AND MISSISSIPPI MUNICIPAL ASSOCIATION,
Appellants,

vs.

DELTA ELECTRIC POWER ASSOCIATION,
Appellee.

BRIEF OF APPELLANT UPON MOTIONS OF APPELLEES TO DISMISS

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BRIEF OF APPELLANT UPON MOTIONS OF APPELLEES TO DISMISS

PRELIMINARY STATEMENT

Mississippi Power & Light Company, herein called "Appellant", appealed two similar cases to this Court (1) against Capital Electric Power Association, herein called

"Capital Association", and (2) against Delta Electric Power Association, herein called "Delta Association", and together called "Associations", or "Appellees". The opinions in these two cases are appended as Appendix "A" and Appendix "B" hereto; the pertinent provisions in the franchise and contract as Appendix "C"; and the Constitution and statutes applicable as Appendix "D".

Appellant filed its Jurisdictional Statement, wherein the constitutional questions are thus stated, Jurisdictional Statement, pp. 6-7:

> "I. Where a contractual franchise is duly granted by a municipality for twenty-five years to serve within *its boundaries* as they now are 'or may hereafter be laid out or extended' and the franchised utility performs the franchise and makes investments in facilities to render service in the disputed area, may the State of Mississippi by the Public Service Commission Act [hereinafter called 'Act'] impair the franchise contract by deleting 'as they * * * may hereafter be laid out or extended', when the municipality had express power to extend or contract its boundaries under the law of the State? * * *.
>
> "II. Where a contract is duly entered into by a municipality with an electric utility to furnish all street lighting service *required by the municipality*, may the State of Mississippi by the Public Service Commission Act impair the contract by holding it ineffectual in the disputed area during the contract period, despite the Contract Clause and the Fourteenth Amendment? * * *.
>
> "III. Notwithstanding the Contract Clause and the Due Process Clause of the Federal Constitution, could the Act, by Section 7716-05(b), Recompiled Mississippi Code of 1942, and the certificate made pursuant thereto by the Public Service Commission, confer upon Associations an exclusive electric franchise in the dis-

puted area and take from Appellant that participation expressly vouchsafed by the non-exclusive provision therein before the expiration of its franchise when, by Section 7716-38, Recompiled Mississippi Code of 1942, it was expressly provided:

> " 'Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts *nor the passage of this act* shall *affect* any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act.' "

"IV. Was there not a denial of procedural due process under the Federal Constitution, Fourteenth Amendment?

"V. By reason of Title 7, U.S.C., Ch. 31, Section 901, et seq., Ch. 432, Title I, Section 4, 49 Stat. 1365, as amended, and said loan to Associations, has Appellant justiciable rights against Association?" (Emphasis is ours, unless otherwise noted.)

Appellant therein filed its argument to sustain the jurisdiction of this Court, Jurisdictional Statement, pp. 13-25. This argument was served upon Appellees and, on September 21, 1963, they severally served elaborate Motions to Dismiss, under Rule 16. Apparently, Appellees admitted probable jurisdiction here when they assumed by their Motions to have dismissals, but sought no affirmances, as would normally be sought. Appellees severally predicated their Motions into two contentions: (a) that Appellant has no contractual grant constitutionally protected and (b) that the State's police power is paramount over any right Appellant may have.

Under the Jurisdictional Statement, Appellant presented an argument in the form of Appendix "8" and invited the Court's attention thereto, if it saw fit, to consider

the same. Now, when Appellees seek dismissals without affirmances in these Motions, it is requisite that Appellant reply to them in full, as Appellees have assumed *pro tanto* an active offensive against Appellant—substantially confessing and seeking to avoid.

I.

PLENARY POWER TO VOUCHSAFE FULL ENJOYMENT OF ITS FRANCHISE FROM 1948 THROUGH 1973 WITHIN THE MUNICIPALITY—i. e., AS IT WAS, AS IT IS AND AS IT WILL BE UNTIL 1973; AND APPELLANT MAY NOT BE EXCLUDED THEREFROM.

A.

As Used in the Franchise, the Term "Municipality", Included the Entire Municipality from 1948 Through 1973.

Had Appellant's franchise been granted directly by the Legislature, no such question could have arisen. *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666.

The State's relation to the municipality is peculiar. Herein the State has authorized the execution of the franchise covering the entire municipality between 1948 and 1973—twenty-five years—and it has likewise directly fixed the boundaries of the franchise but to be expanded or contracted by its agent under express delegated power thereasto as the public welfare required. It was necessary, obviously, that the City be empowered to expand its boundaries in order to provide municipal benefits to the growing population. The municipality became of that size essential for local self-government in 1959 and was under the

franchise lawfully expanded. In short, the municipality, as an agency of the State, has exercised (a) the power to grant the franchise and likewise (b) to extend its corporate limits during the period wherefor the franchise was. Being thus circumstanced, the State by Section 3375, *Recompiled Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*), empowered the municipality to contract and be contracted with in accordance with its discretion.

Note *Yazoo City* v. *Lightcap*, 82 Miss. 148, 33 So. 949, wherein it is said:

> "* * * 'The maxim that legislative power must not be delegated is to be understood in the light of the immemorial practice of this country and England, which has always recognized the policy and propriety of vesting in the municipal organization certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than central authority.' Cooley, Const. Lim., p. 140, note 118."

The word, "municipality", had been uniformly recognized throughout the judicial history of Mississippi as embracing the entire area within the corporate limits and such has been the interpretation nation-wide. Compare 37 *Am. Jur.*, "Municipal Corporation", Section 34, p. 651; 62 *C.J.S.*, "Municipal Corporations", Section 78, p. 186; *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 5, Sec. 1530, p. 129; *Pond on Public Utilities*, 4th Ed., Sec. 131, p. 316, *et seq.* But in the present franchise, to make express the implication, the words "now or hereafter" occur and occurring are conclusive; and, under the constitutional grant, this Court is the sole repository wherein this may be effectuated. With deference, the Mississippi Court can find no support for the exclusion of that which the contract

both expressly and impliedly contained. The phraseology meant, and still means, the entire area within the corporate boundaries of Winona from 1948 to 1973. Within those boundaries during that period, this non-exclusive franchise existed and was dominant. The fact that the State vested in the municipality, its agency, authority thus to contract was an implied obligation upon the part of the State that when a contract was thus made, it would be obligatory just as effectual as if the State had directly contracted. *Qui facit per alium facit per se.* 74 *C.J.S.* 4. *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. ed. 341.

To allow the principal to repudiate the act of the agent done under one grant in virtue of the fact that it had made two grants of power is basically dishonest, especially when the decisions of Mississippi's Court and this Court in *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 60 L. ed. 1102; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, hereinafter called "Crumpler Cases", had established validity expressly. Whether the State could thus play fast and loose with a contract, which was recognized as potent for three-fourths of a century, is that wherefor this Court has been created. However, the State has not made this contention, was not before the Court when it was adjudged and the sole protagonist is an association not in privity and impotent to challenge. Compare *Middleton* v. *Georgetown Mercantile Co.*, 117 Miss. 134, 77 So. 956.

With the utmost respect, it is incomprehensible that the Supreme Court of Mississippi that decided these cases is the same Court which so recently decided *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666. Therein that Court held that Section 5(e) of

the Public Service Commission Act (Chapter 372, *Mississippi Laws 1956*, as amended) was unconstitutional as applied to impose a 2% tax on the use of city streets by a telephone company because impairing a franchise contract in violation of Section 16 of the *Constitution of Mississippi*. We say "incomprehensible" because that decision relied on the following authorities, in part:

(a) Quoting 131 So.2d 673:

> "* * * Perhaps the leading case is Russell v. Sebastian, 1914, 233 U.S. 195, 34 S. Ct. 517, 521, 58 L. ed. 912. The issue was whether a gas company could lay *an extension* of its line in the City of Los Angeles under an 1879 constitutional section which gave the company the 'privilege' of using the streets. That provision was repealed by a 1911 constitutional amendment. The California court held the authority had terminated in 1911, but the United States Supreme Court reversed. The grant, resulting from an acceptance of the state's offer, *constituted a contract*, and vested in the company a property right protected by the contract clause. With reference to the extent of the grant, *the actual user did not measure it*. When accepted and acted upon, it became binding *as an entirety*, 'not foot by foot, as pipes were laid.' The offer as made was accepted as an entirety, and not PRO TANTO." (Capital emphasis by the Court).

We direct special attention to the italicized portions of this Court's opinion. In the *Sebastian* case it is said (58 L. ed. 923):

> "In view of the nature of the undertaking in contemplation, and of the terms of the offer we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance PRO TANTO. We think that the offer was intended to be accepted *in its entirety as made*, and that acceptance lay in conduct committing the person accepting to the described

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service. The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we cannot doubt that the offer was accepted. City R. Co. v. Citizens' Street R. Co., 166 U.S. 557, 568, 41 L. ed. 1114, 1118, 17 Sup. Ct. Rep. 653; Grand Trunk Western R. Co. v. South Bend, supra. In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city.

"This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the state's grant should assume. The service, as has been said, was a community service. Incident to the undertaking in response to the state's offer was the obligation to provide facilities that were reasonably adequate. Lumbard v. Stearns, 4 Cush. 460; Cumberland Teleph. & Teleg. Co. v. Kelly, 87 C.C.A. 268, 160 Fed. 316, 324, 15 Ann. Cas. 1210; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U.S. 1, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N.Y. 528, 533, 47 N.E. 787; Morawetz, Priv. Corp., § 1129. It would not be said that either a water company or a gas company, establishing its service under the constitutional grant, could stop its mains at its pleasure and withhold its supply by refusing to extend its distributing conduits so as to meet the reasonable requirements of the community. *But this duty and the right to serve, embracing the right under the granted privilege to install the means of service, were correlative.*

"In People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N.Y. 528, 533, 47 N.E. 787 (approved in Illinois C. R. Co. v. Chicago, 176 U.S. 646, 666, 44 L. ed. 622, 629, 20 Sup. Ct. Rep. 509), a grant of authority to lay conduits for conveying gas through the streets of a town, so as to render service to the people of the

town, was held to extend as a property right *not only to the streets then existing, but to those subsequently opened.* The court said: 'It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but imposed an obligation upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, *such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old.*'"

Note also *Illinois Central Railroad Co.* v. *Chicago*, 176 U.S. 646, 44 L. ed. 622, 629, 20 S. Ct. 509, also approved in the *Sebastian* case.

(b) *Pacific Telephone & Telegraph Co.* v. *City of Los Angeles*, 44 Cal.2d 272, 282 P.2d 36, held that the franchise contemplated "new streets to be opened and old ones lengthened as undeveloped areas became settled." The sixth syllabus is as follows:

"[6a, 6b] * * * Grant of state franchise to use highways and other public places in operating telephone system necessarily contemplates that new streets will be opened and old ones lengthened as undeveloped areas become settled, and *such franchise*

rights extend to areas where there have been no streets or telephone service PRIOR TO ANNEXTION OF SUCH AREAS to city having charter power to regulate use of its streets for telephone purposes."

(c) *City of Owensboro* v. *Cumberland T. & T. Co.*, 230 U.S. 58, 33 S. Ct. 988, 57 L. ed. 1389, held that "The municipal ordinance was an offer accepted by the telephone company, and became a contract constituting an unimpairable right", 131 So.2d 673. And this case upheld as inviolable that franchise despite the clause therein:

"Sec. 6. This ordinance may be altered or amended as the necessities of the city may demand."

(d) *City of Louisville* v. *Cumberland T. & T. Co.*, 224 U.S. 649, 663-664, 32 S. Ct. 572, 56 L. ed. 934, is to the same effect as the *Owensboro* case and approves *People ex rel. Woodhaven Gaslight Co.* v. *Deehan*, 153 N.Y. 528, 47 N.E. 787.

(e) *Grand Trunk Western Railway Co.* v. *City of South Bend*, 257 U.S. 544, 57 L. ed. 633, 33 S. Ct. 303, holds that a municipal franchise to build a street railway "* * * was single and specific; and when accepted and acted upon became binding—not foot by foot, as the rails were laid, but as an entirety". Likewise, the Winona franchise and lighting contracts were made and accepted as an entirety, for the entire town.

(f) *Traverse City* v. *Consumers Power Co.*, 1954, 340 Mich. 85, 64 N.W.2d 894, follows both the *Sebastian Case* and the *Deehan Case*.

(g) *City of Seattle* v. *Western Union Telegraph Co.*, 1944, 21 Wash.2d 838, 153 P.2d 859, approved the *Sebastian Case* and in its 8th syllabus holds:

"The State's statutory grant to telegraph company of right to operate, construct and maintain its

> lines along public highways or streets without compensation included not only * * * its lines on streets of city occupied by company at time of passage of act, but also on such additional streets as might be necessary in furnishing public service for which company was formed * * *."

We cannot refrain from citing still other authorities which might have been cited by that Court in the *Meridian Case*, all announcing the general rule that a municipality has the power to grant a franchise to use its streets within its current boundaries and as the same may be thereafter extended, such a franchise being constitutionally inviolable:

(a) *Tulsa St. Ry. Co.* v. *Oklahoma Union Traction Co.*, 27 Okla. 339, 113 Pac. 180, follows the *Deehan Case*.

(b) *Seattle Lighting Co.* v. *City of Seattle*, 54 Wash. 9, 102 Pac. 767, follows the *Deehan Case*.

These authorities demonstrate, we respectfully submit, that that Court erred in trying to evade the impairment-of-obligations clause by *raising up a phantom limitation upon the power of each of the municipalities of this state; every city must be able to legislate and to contract throughout its entire boundaries, however they may be expanded or contracted.*

In this regard, this same rule applies even where a municipality is abolished and its area and people, with some excisions or annexations, are reconstituted into a new municipality. *Broughton* v. *Pensacola*, 93 U.S. 266, 23 L. ed. 896 (followed in *Ross* v. *Wimberly*, 60 Miss. 345); *Shapleigh* v. *San Angelo*, 167 U.S. 646, 653, 654, 42 L. ed. 310; *Mobile* v. *Watson*, 116 U.S. 289, 29 L. ed. 620; *Mount Pleasant* v. *Beckwith*, 100 U.S. 514, 25 L. ed. 699; and *Vilas* v. *Manilla*, 220 U.S. 345, 55 L. ed. 491. If the abolition

of a municipality and the reconstitution of its area and annexed area does not abolish a franchise, how can mere annexation do so?

It is, therefore, respectfully suggested that, by this decision—in addition to announcing the implied repeal of numerous time-honored statutes giving municipalities full jurisdiction of their streets—that Court has impliedly overruled *Southern Bell Telephone & Telegraph Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666, and cast grave doubts on *Ross* v. *Wimberly*, 60 Miss. 345. And yet where is the authority for such an upheaval? It is respectfully and earnestly urged that there is none and that no justification exists either in law or in logic for thus departing from the thorough and excellent decision in *Southern Bell Telephone & Telegraph Co.* v. *City of Meridian, supra*, and circumventing the Constitutions.

B.

The Contract Was Validly Granted by the State of Mississippi under Plenary Authority Therefor Precedently Vouchsafed to the State's Agency.

The authorization given by the State, whereunder this contract was made, provides, Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*):

> "* * * And such municipality may contract and be contracted with and exercise and perform all municipal powers and duties."

Such franchise had to be non-exclusive and this one was, for twenty-five years. The State on the 23rd day of February, 1948, prescribed the then boundaries of Winona as that wherein the franchise would be, but for the public welfare expressly provided by Section 3376, *Mississippi*

Code of 1942, (now Section 3374-10, *Recompiled Mississippi Code of 1942*) that that which now was might be extended or contracted, compare *In the Matter of the Enlargement of the Municipal Boundaries of the City of Forest, Mississippi*, ____ Miss. ____, 153 So.2d 688; and when the State thus did, our franchise but repeated that specifically binding. This question is not *res nova*, but rests upon statutes whose verbiage was validly adjudicated seventy-five years ago. *Henry* v. *Henderson*, 103 Miss. 48, 60 So. 33. As said by Mr. Justice Shiras in *Vicksburg Waterworks* v. *Vicksburg*, 185 U.S. 65, 69, 46 L. ed. 808, 811:

> "By an act of the legislature of the State of Mississippi, approved on the 18th day of March, 1886, the city of Vicksburg was authorized 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, *and to that end to contract with a party or parties who shall build and operate waterworks*'."

Pursuant to this power the Mayor and Board of Aldermen passed the ordinance quoted in 185 U.S. 65, 69, 76, 46 L. ed. 808, 811, 813:

> " 'Sec. 1. That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining, and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares, *and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction*, * * *.'
>
> * * *

> " 'Sec. 13. The said Samuel R. Bullock & Company, their associates, successors, or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water, as they may determine; provided, that said rates and charges shall not exceed 50 cents for each 1,000 gallons of water.' "

In *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771, applied and approved by this Court in *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, the power of the State, through Jackson, was thus declared by Mr. Justice Cooper, p. 643:

> "In view of the nature and character of the subject-matter of the contract which the board of mayor and aldermen of the city of Jackson was authorized to make by the third section of the act of February 29, 1888, we think the contract entered into with the appellant was within the delegation of power, so far as the time of its duration is involved. The language of the act is 'that the board of mayor and aldermen be, and they are hereby, authorized and empowered to contract with any reliable corporation, association or individual, for supplying the said city of Jackson with water and electric or gas lights, from year to year, * * *.' "

See *Meridian Waterworks* v. *City of Meridian*, 85 Miss. 515, 37 So. 927.

Mississippi's Court had decided *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771, in 1895, and had further decided *Reid* v. *Trowbridge*, 78 Miss 542, 29 So. 167, in 1900, and in the *Trowbridge Case*, involving this specific "now or hereafter" clause, no attack was made in this aspect. To make assurance doubly sure, this Court then decided *Vicksburg* v. *Vicksburg Waterworks Co.*, 202

U.S. 453, 50 L. ed. 1102, whereunder the same "now or hereafter" provision was before the Court and not challenged. Then came *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, where the same franchise was involved with the "now or hereafter" clause incorporated, and this Court found naught therein objectionable for very possibly the then counsel thought it had been, as we respectfully submit it had been, ultimately determined that when the State, acting through the Legislature, had employed the municipality as a governmental instrumentality to contract without qualification, normal contracts, then usual and customary, when made, were inviolate. Note that said, 206 U.S. 515:

> "In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg, the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years; and, in the absence of a showing of unreasonableness 'so gross', as the court of Mississippi has said, 'as to strongly suggest fraud or corruption', this action of the council is binding and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party.
>
> "While we, therefore, reach the conclusion that the former case did not adjudicate the matter, we think the contract in this respect was within the power of the council, and cannot be violated consistently with the contract rights of the company by the subsequent ordinances of the city."

This Court must construe the authority delegated. The State, beginning with the Vicksburg statute, gave its agency

the power to contract within certain guide lines; but it made by legislative fiat the action of the municipality conclusive as to its boundaries, whether they remained stationary or were to be expanded. Furthermore, this Court recently in *Arizona* v. *California*, ... U.S. ....., 10 L. ed. 2d 542, when speaking of a similar grant of power, said, p. 566:

> "* * * The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it. * * *."

Cleveland v. *Cleveland City R. Co.*, 194 U.S. 517, 533, 48 L. ed. 1102, 1107:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

When the State saw fit, with qualifications not here relevant, to vest power to contract in the municipalities and pursuant thereto the municipality, acting for the State, did contract, the Contract Clause came into play. Compare *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155.

In *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204, Wisconsin assumed to transfer ordinance contracts into indeterminate certificates with-

cut the contractee's consent. This Court thereasto said, p. 137:

> "The integrity of contracts—matter of high public concern—is guaranteed against action like that here disclosed by §10, art. 1, of the Federal Constitution: 'No state shall . . . pass any . . . law impairing the obligation of contracts.' It was beyond the competency of the legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract. Vicksburg v. Vicksburg Waterworks Co. 206 U.S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Detroit United R. Co. v. Michigan, 242 U.S. 238, 253, 61 L. ed. 268, 275. P.U.R. 1917B, 1010, 37 Sup. Ct. Rep. 87. The erroneous conclusion concerning this Federal question led to the decree below. * * *."

Cleveland v. *Cleveland City R. Co.*, 194 U.S. 517, 48 L. ed. 1102; *Detroit United R. Co.* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268.

With the utmost deference to Mississippi's Court, they stress the fact that on March 29, 1956, there had not been made the addition of Area "B" to Winona as at now and, therefore, that in virtue of that action not having been taken, the Legislature, who gave the entire area, was privileged to split it as against the donee who was entitled to the unity so soon as the Mayor and Board of Aldermen had exercised the power vested under Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississippi Code of 1942*). That power has been exercised. That which the Mississippi Court assumes to do is to place the Act, as at March 29, 1956, *in vacuo* and to tear out of the contract that which the Legislature had specifically directed and the parties had agreed upon, that when additions were made that they would be within the municipal limits and that thereover Appellant would possess that contracted for. We start with "now" (the limits on Feb-

ruary 23, 1948, Area "A"), and then the limits on the extension, November 3, 1959, Area "B"; and that which Mississippi's Court, with deference, has not dared to deny is that in good faith under existing decisions the contract of 1948 was made. We apply the maxim, "Qui facit per alium facit per se", *Broom's Legal Maxims*, p. 818. Three-under the State must be just to Appellant before it can be generous to Appellee. Section 3376, *Mississippi Code of 1942*, and the express provision of the franchise provided that Area "B" should be irrevocably under the contract upon November 3, 1959. The State could not legislate herself from this obligation effective until February 22, 1973. If it were possible for the State then to give that which it initially had the power to give, the Appellant has those rights which we have asserted. Suppose the franchise had specifically provided that instead of "hereafter", "on November 3, 1959, and on and after this date", the State had conferred on Area "B" of the City that requisite to make of the city a unity and to prevent second class citizens therein. Compare *Gomillion* v. *Lightfoot*, 362 U.S. 339, 5 L. ed. 2d 110, citing *Mobile* v. *Watson*, 116 U.S. 289, 29 L. ed. 620, and *Graham* v. *Folsom*, 200 U.S. 248, 50 L. ed. 464.

Thus the State having authorized Winona as at the 23rd day of February, 1948, to grant a franchise throughout the city as it then was and Appellant having contracted under the future planning now essential thus to do, the Legislature having given by contract the entire city, may not sever the contract in Area "B" and donate to the Appellees. Appellant is perfectly willing for Appellee to have that which the State could lawfully donate after Appellant's rights hereinabove quoted specifically were conserved.

C.

But If Therein We Err, Then the State Never Having So Intended Wrought Complete Rectification by Section 7716-38, Recompiled Mississippi Code of 1942.

Section 7716-38, *Recompiled Mississippi Code of 1942*. provides:

> "Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

The *Crumpler Cases, supra,* demonstrating the contract validity under the impairment clause of the Constitution precluded any other construction than that wherefore we contend—the municipality embraced the entire area within its bounds from 1948 to 1973, twenty-five years, both impliedly by using the word "municipality" and expressly by adding thereto the words, "now or hereafter".

The Act, instead of taking away Appellant's rights, confirms them, in this, that Section 7716-05(b), alleged to have been emasculated, is but a general provision and there is therein the last provision, Section 7716-38.

Admitting, as we most surely do not, that this Court and the Mississippi Court will determine *contra* to that said in (a), then surely let it be noted that Section 7716-05(b), whereunder the Commission and Mississippi's Court ousted Appellant from its constitutional rights and condemned it to desist from profitable operation in Area "B", is but a part of the Act and that the last section in the Act specifically thus provides, Section 7716-38:

"Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

In *United States* v. *Heinszen*, 206 U.S. 370, 382, 51 L. ed. 1098, 1102, this Court said:

"That where an agent, without precedent authority, has exercised, in the name of a principal, a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations, is also elementary. * * *

"* * * * * * If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and (the power) to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority, according to the Maxim, *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*. Under the Constitution Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257. Congress may legislate within the District, respecting the people and property therein, as may the legislature of any state over any of its subordinate municipalities. It may therefore cure irregularities, and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.'"

Quoting from *Mattingly* v. *District of Columbia,* 97 U.S. 687, 24 L. ed. 1098, 1099. See also *Vaughan* v. *Swayzie,* 56 Miss. 704. Appellant must have a dominant franchise throughout the municipality.

In this cause the Appellees were sole complainants and the State was not a party, as such, in either cause, nor subject to suit. Winona was never a party so that the decrees herein are as between the Appellees, Associations, and Appellant, the Power Company, *res judicata;* but as between the Appellant, the State and Winona *res inter alios acta;* and as to the State a nullity. *Chase National Bank* v. *Norwalk,* 291 U.S. 431, 78 L. ed. 894; *Hansberry* v. *Lee,* 311 U.S. 32, 85 L. ed. 22.

This Court in *Arizona* v. *California,* ..... U.S. ....., 19 L. ed. 2d 542, had in mind certain appropriations that were beyond the apportioning power of the Secretary of the Interior, and therein quoted as apposite the statute. Footnote 87, p. 569:

> "87. 'Nothing . . . in (this Act) shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing . . . (herein) shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.' 43 USC §383 (1958)."

Compare *Head* v. *Board of Examiners,* ..... U.S. ....., 10 L. ed. 2d 983, Opinion, Mr. Justice Brennan, pp. 990, 996.

Note the Act contains the provision as to the certificate of convenience and necessity, Section 7716-05(b), and

at the same time, passed as a unit, it contains Section 7716-38. These two sections, inseparably integrated, must be judicially determined, *Coker* v. *Wilkinson*, 142 Miss. 1, 106 So. 886, and if absolutely irreconcilable, the Court said, p. 887:

> "* * * and that the latter clause being in conflict with the former and being the last expression of the Legislature on the subject, must stand and the former go down under the principle of law that, where there are two conflicting provisions in the same statute, the last expression of the Legislature must prevail over the former. Undoubtedly that principle of statutory construction is sound. * * *."

Craig v. *Walker*, 191 Miss. 424, 2 So. 2d 806; 50 *Am. Jur.*, "Statutes", Section 365, p. 370; *Inglehart* v. *Inglehart*, 204 U.S. 478, 51 L. ed. 575; and supplementally, this Court said in *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208, 76 L. ed. 704, 708:

> "* * * General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. United States v. Chase, 135 U.S. 255, 260, 34 L. ed. 117, 119, 10 S. Ct. 756, 8 Am. Crim. Rep. 649. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. * * *. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. * * *."

Approved in *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 6 L. ed. 2d 72, 76.

Basically under the prior decisions here and in Mississippi, Appellant had contractual rights. When in 1956, this legislation was before the Legislature, the utilities were not either dead or dumb. They realized what was

upon them and that they must protect themselves as to their franchise under the Contract Clause; and that they so thus did, those here signing can as of knowledge state, and the terms of the Act so show. This protection is found in Section 7716-38. This Act recognizes that there may be utilities within the same municipality, but this section is a specific section, which, under settled law, constitutes an exception to the prior general provisions and as such makes this section the crux of this case:

> (1) "Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, * * *."

But under the decisions of this Court and the Supreme Court of Mississippi, there was thereasto a contract, unimpairable, and when repeal by the State is attempted of a provision of a contract, so that there will be an impairment, that done by the State is a nullity. *Louisiana* v. *Pilsbury*, 105 U.S. 278, 301, 26 L. ed. 1090, 1098, wherein it is said:

> "The case of Von Hoffman v. Quincy, reported in 4th Wallace, 535 (71 U.S., XVIII., 403), is a leading one on this subject. The court there said: 'That when a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound.'"

It is true, however, that Mississippi's Court did say, *Delta Electric Power Association* v. *Mississippi Power & Light Company*, Miss. ....., 149 So.2d 504, 513:

> "All of these statutes must be read together, and in the light of subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, *the Act modifies them*. * * *."

With deference, we defend our Court against the accusation that it was there assuming to act in contravention of the Contract Clause. It knew better and has revered that Clause. *Yazoo & M.V. R. Co.* v. *Adams*, 90 Miss. 559, 45 So. 91; *Wisconsin Lbr. Co.* v. *State*, 97 Miss. 571, 54 So. 247. And if this so be, then potentially reversal must be had with a remand to Mississippi's Court to delimit the State's interpretation of this statute, *Metlakatla Indian Community* v. *Egan*, 363 U.S. 555, 4 L. ed. 2d 1397, so that if essential this Court may see clearly to pluck out the mote.

> (2) "* * * but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, * * *."

It is perfectly obvious that these utilities in Mississippi with their monies invested, were vitally interested in the passage of this Act, and, with deference, saw no impairment therein or thereby under the nonexclusive contract of electric service within the municipality as it from time to time might be changed as to boundaries under the reserved power in *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389; and *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. ed. 2d 110. Note that the Legislature diligently considered the matter as Mississippi's Court said and when they so did used in this section "repeal" and "passage", so as that there would be no possible contention, with deference, such as Mississippi's Court has assumed to raise up.

The first provision says that "neither the repeal of any such acts * * * shall affect any act done, or any cause of action, whether in litigation or otherwise". Appellant was thoroughly conversant with that which began with Vicksburg and continued down until the passage of this

Act and it will not be challenged by anyone that had it been dreamed that the effect of this Act was to impair the obligation of every franchise, every all-requirements contract, in every municipality in the State, there would have been the most violent protest at unsettling by impairment the basic conceptions that had persisted for nearly three-quarters of a century. The Court will see that the Legislature, notwithstanding the repeal of any act in conflict, then went further and stated that such repeal should not "affect any act done, or cause of action, whether in litigation or otherwise". This is extraordinary, but more extraordinary is the further declaration, "or any rights accruing, accrued or established prior to the effective date of this act". In *Arizona* v. *California*, ... U.S. ....., 10 L. ed. 2d 542, 553, this Court said:

> "* * * Under that law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short-hand expression of this legal principle * * *"

"Qui prior est tempore, potior est jure", *Broom's Legal Maxims*, p. 362; 51 *C.J.* 297. Thus with the valid acceptance and erection of the facilities the State lost its potency to impair.

Note the further declaration "nor the passage of this act shall affect any act done or any cause of action, whether in litigation or otherwise". The pronoun "this" is all-inclusive and embraces every provision of the Act from its title to its approval. With deference, this language falls squarely within the reasoning of Mr. Justice Black in *United States* v. *Braverman*, ... U.S. ....., 10 L. ed. 2d 444; and any impairment of that specifically granted to the Appellant was as effectually condemned as

was the rebate under the Interstate Commerce Act. It is essential, with deference, when the Legislature thus speaks, that the courts vouchsafe protection to those who have acted upon grants made by the State through the same appropriate words, as have been respected from time out of mind.

(3) Note, finally, Section 7716-38:

> "* * * or any rights accruing, accrued or established prior to the effective date of this act."

In 30 *C.J.S.* 1232, "Established" is thus defined:

> "* * * made definitely certain, settled unalterably, or made final beyond question or dispute in so far as any question can be settled in a court proceeding; purchased."

Wells Lamont Corporation v. *Bowles*, App., 149 F.2d 364, 366, certiorari denied, 326 U.S. 730, 90 L. ed. 434; *District of Columbia* v. *Fleming*, C.A., D.C., 217 F.2d 18; *Walling* v. *Fred Wolferman, Inc.*, D.C. Mo., 54 F. Supp. 917.

Note further the words "any rights accruing, accrued". *United States* v. *Lindsay*, 346 U.S. 568, 98 L. ed. 300, 304. As at the date of the passage of the Act, all of the rights under this franchise to that moment are conceded to have existed, and but for the Act could have been enjoyed. Now, with this fixation of these rights accrued to the moment of the passage of this Act, the Legislature went further and used the participle "accruing"—rights accruing. Unquestionably, the contract franchise "hereafter" falls definitely within that term. *Spring City F. Co.* v. *Commissioner of Internal Revenue*, 292 U.S. 182, 78 L. ed. 1200, 1203; see, especially, *H. Liebes & Co.* v. *Commissioner of Internal Revenue*, C.A. 9, 90 F.2d 932, reviewing cases. See also *Grenada Bank* v. *Petty*, 174 Miss.

415, 164 So. 316; *United States* v. *St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 70 L. ed. 435; *Fullerton-Krueger Lbr. Co.* v. *Northern Pac. R. Co.*, 266 U.S. 435, 69 L. ed. 367; *United States* v. *Munro-Van Helms Co.*, C.A. 5, 243 F.2d 10, 12; 1 *C.J.S.*, "Accrue", p. 759.

Hereasto, that submitted certainly demands the exercise of the exclusive jurisdiction, especially because there being a contract, the State Legislature, under the holding of the Court, here divided the contract into two parts, leaving Appellant to be bound by and perform *qua* Area "A" and divested even a pretense of a right in Area "B"; and thereasto, substantially, with deference, so adjudged as that if Appellant passed over Appellee's Area "B" to perfect its electric connections, there would be a law violation. That demanded is as large a charter as the winds require within Winona until February 22, 1973; but *arguendo* that the Court should hold that naught has been said of sufficient moment to require a hearing on the merits and to that extent we stand defeated, yet like the village schoolmaster, we can argue still, and, with deference, accurately.

D.

But If We Err in the Foregoing, with Deference, This Court Must under the Implied and Express Terms of the Statutes and Franchise Vouchsafe an Interpretation Whereby Appellant Had a Valid Contract Within the Boundaries of the Municipalities As They Were, Are, and Are Yet to Be.

An appropriate construction of Section 7716-05(b) is to be had whereby serious constitutional questions may be avoided, *United States* v. *Witkovich*, 353 U.S. 194, 1 L. ed. 2d 765; and Section 7716-05(b), on its face, related

exclusively to the future with Appellant's franchise dominant.

Section 7716-05 and Section 7716-05(b) of the Act definitely and expressly provide:

> "No person shall construct, acquire, extend or operate equipment for * * * generating, transmitting or distributing * * * electricity, * * *, for any intrastate sale, to or for the public for compensation, * * * without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.
>
> * * *
>
> "(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or *operation then being conducted*, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; * * *."

Basically, these two sections must be construed by this Court so far as the Contract Clause is alleged to be impaired. *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102. In construing the franchise possessed by Appellant hereinabove quoted in full, this Court must so construe this section of this Act, forgetting for the moment Section 7716-38, so as to make Appellant's the dominant franchise and Appellee's rights servient thereto. The admeasurement of these rights need not be herein made, not being at issue. Confessedly the cases of *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771; *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167; and

Griffith v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011, had been determined by the Supreme Court of Mississippi, and each of them had approved the grant made by the municipal boards under the authority of the State. *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155. Insofar as this Court went it assumed to regulate rates throughout the area under Section 13 of the ordinance, both as it was when the grant was made and potentially after Vicksburg was in process of expanding. Appellant's system at Winona was owned and operated and the right thus to do was vouchsafed constitutionally until 1973. Appellant's contract to that extent has not been questioned by the State, *qua* State, or by Winona, and Appellee has no justiciable rights as to the areas not certificated to it. Grants by the State to Appellee, as well as to all other persons, are to be strictly construed in favor of the grantor. In *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 469, 50 L. ed. 1102, 1111, this Court said:

> "In considering this contract we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the waterworks company during the period of this contract, it cannot be held to have done so by mere implication. * * *."

Citing *Knoxville Water Co.* v. *Knoxville*, 200 U.S. 22, 50 L. ed. 353.

As to the power of the Legislature to superimpose upon Appellant and its franchise rights a provision for an

indeterminate future franchise, this Court has specifically made denial. *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204. The right of the State to amend Appellant's contract had to be specifically reserved. *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389. As to the franchise being at all times co-extensive with the municipal boundaries, the law itself thus did under Section 3374-10; and, with the utmost deference, the Supreme Court of Mississippi completely missed the road laid down by this Court and all other Courts that when the boundaries of a municipality are extended or contracted and provision so made as that the State may legislate, all obligations are contemporaneously citywide, especially when so made as is herein done by explicit provision. Section 3374-10. Compare 37 *Am. Jur.*, "Municipal Corporation", Section 34, p. 651; 62 *C.J.S.*, "Municipal Corporations", Section 78, p. 186; *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 5, Sec. 1530, p. 129; *Pond on Public Utilities*, 4th Ed., Sec. 131, p. 316, *et seq.*

These authorities recognize, with deference (a) "Modus et conventio vincunt legem", Broom's Legal Maxims, p. 689, and that the Contract Clause exists and (b) that in the statutes "municipality" is synonymous with and must be read to include, unless prohibited, expansions and contractions. Such expansions or contractions are operative (a) *eo instanti* when made and (b) *proprio vigore* under the statutes. In certain decisions, this is exemplified thus, 13 *Am. & Eng. Anno. Cases* 137:

> "A municipality has power to contract by ordinance that a franchise granted shall be in force in the corporate limits of the city as they exist at the time of the passage of the ordinance or as they may thereafter be enlarged, for, if the ordinance were silent as to the territory thereafter taken into the city, the

meaning would be the same. Truesdale v. Newport, (Ky.) 90 S.W. 589."

So our respectful submission is that this Court must for itself determine whether the offer to contract with the State through its municipality, when accepted, became a contract binding the State as well as the municipality up to the boundaries as they exist from day to day. That the State acted through the municipality in no wise diminished the obligatory effect of the contract. *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. ed. 341. Under *Yazoo City* v. *Lightcap*, 82 Miss. 148, 33 So. 949, Mississippi's Court recognized the propriety of allowing each municipality to contract so as to best promote its particular welfare—especially the future planning. Naught reasonably and appropriately granted to Appellee may be so construed as to oust Appellant from an area which, under settled law for three-quarters of a century, has been validly subject to legislation through the municipal agency when, as here, appositely delegated and appropriately ratified, to say nothing of the impropriety of Mississippi's Court taking Area "B" of the municipality and giving it gratuitously, and possibly contrary to Section 95, *Mississippi Constitution*, to Appellee. Thereasto in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 702, 4 L. ed. 629, 675, Mr. Justice Story declared:

> "* * * This question cannot be answered in the affirmative until it is established, that the legislature may lawfully take the property of A and give it to B; * * *."

This litigation was most violent and involved many other issues, one of which took away from the municipalities the rich revenues potentially realizable through sale of the franchise.

Our submission is that under this jurisdictional statement, the basic contract provisions quoted hereinabove are valid as granted, but if perchance not so, then ratified specifically; and again, if perchance not so, then *per se* did not authorize the Commission to take from Appellant that which was its own and vest it in another gratuitously.

Conclusion.

As to the State Court's construction that the two municipalities, as a whole, from 1948 to 1973 do not embrace all of their parts, it is so fundamentally specious as to demand rectification, especially when:

(1) The State is not a party and has not been herein; and the construction by Mississippi's Court at the behest of the Associations contravenes the construction of precisely similar contract provisions in the decisions in the *Crumpler Cases* in this Court, as well as the Mississippi decisions on which the *Crumper* decisions were predicated.

(2) The legislative intent was not to impair that to Appellant rightly belonging or to give it to Appellees, the Contract Clause preventing (Section 7716-38, *Recompiled Mississippi Code of 1942*).

II.

THE POLICE POWER COULD NOT IMPAIR THE SPECIFIC GRANT WITHIN THE MUNICIPALITY.

(a) The Act did not pretend so to do. With deference, we defend the Legislature against an intention to impair—*per contra*, as indicated in I, *supra*, the Legislature, if it were essential, has validated; and, therefore, no such question arises.

(b) Assuming there is such question, then the police power is not adequate therefor and the line of demarcation

between the contract and the police power is a Federal question that must be solved here. This Court alone can thus sever and divide the Federal from the State authority; and, in dividing, it must admeasure the exigencies which require the impairment and mark the line whereat the contract becomes void. *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 78 L. ed. 413. This Court must now do precisely what it did when it decided the case of *Veix* v. *Sixth Ward Building & Loan Association*, 310 U.S. 31, 84 L. ed. 1061, and differentiated *Treigle* v. *Acme Homestead Association*, 297 U.S. 189, 80 L. ed. 575. And just as that differentiation gave jurisdiction, so does that now herein demanded. See *Stone* v. *Mississippi*, 101 U.S. 814, 25 L. ed. 1079.

Mississippi's Court cited only the case of *Superior Oil Company* v. *Foote*, 214 Miss. 857, 59 So.2d 844 (1952), which concerned only unitization of fugacious hydrocarbons. It is quite inapposite. Mississippi's Court did not dream of the police power preventing, when it declared valid the Telephone Company's rights. *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666 (decided after the District Court, the Court of Appeals and this Court had cleared the way therefor: 154 F. Supp. 736, affirmed 256 F.2d 83, vacated 358 U.S. 639, 3 L. ed. 2d 562), and the power to tax being quite analogous and substantially equivalent to the police power.

When, therefore, Appellees argue that Appellant's contract is impairable despite the Contract Clause, the higher rights of the people demand that this Court assign the reason why the State power—police power—supersedes the constitutional prohibition. In the *Crumpler Cases*, *supra*, this Court assumed jurisdiction and maintained precisely similar contracts under the supremacy of the Constitution. Has that instrument now lost its supremacy?

If there be this contract clause and, if it is to be impaired under the police power, this Court alone can so declare; and it is absolutely requisite that it lay down the ground rules. Frankly, we cannot find any decisions so allowing. The nearest approach is *Superior Water, Light & Power Co.* v. *City of Superior*, 263 U.S. 125, 68 L. ed. 204.

Therefore, when Appellees admit the contract as protected by the Contract Clause and the right is claimed, not by the State, but by an instrumentality of the Federal government, it is imperative that this Court act. See Point IV, *infra*, and Point V in the Jurisdictional Statement.

If the police power hereasto be apposite, then, with deference, the Constitution hath lost its savor and is fit only to be trampled under foot. We reiterate, Appellees have not taken issue with the authorities in our Jurisdictional Statement; but have, taking the offensive, assumed to confess and avoid—therein, with deference, they have not overcome.

III.

DIFFERENTIATION OF APPELLEES' AUTHORITIES INCLUSIVE OF BOTH (A) THE ALLEGED WANT OF POWER AND (B) THE POLICE POWER.

We reiterate, with deference, our Jurisdictional Statement and the arguments therein, which we respectfully submit have not been answered, and ask the Court to consider it in connection with Appellees' authorities. Especially do we call attention to the failure of Appellees to indicate the extent of the State's power—the relation between the State and its agency, the municipality. For seventy-five years the word "municipality" has covered in these franchises the boundaries as was, as is, and as is

to be, until termination. The *Crumpler decisions*, as well as the Mississippi cases cited, have specifically held under grants no broader than those under which these municipalities acted, that municipal boundaries, even if extended, admeasured for thirty years the franchise contract. Such a construction is absolutely requisite to protect the jurisdiction of a city wherein there is continuous change and growth and the necessity for additional income obtainable from franchise sales which have been imperilled by these decisions. The Legislature made express provision for this change and growth by vesting the municipality, as its agent, with power to expand.

A. Delta Association's authorities:

1. *Lynch* v. *United States*, 292 U.S. 571, 78 L. ed. 1434 (Motion p. 5). Unquestionably, counsel's quotation is correct, but counsel overlooks the Mississippi cases holding, since *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629, that appellant had a contract. Note the further declaration in the *Lynch Case*, 292 U.S. 580, 78 L. ed. 1441:

> "* * * But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditures, would be not the practice of economy, but an act of repudiation. * * *."

Note the approval of our contention in *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666. There it was not even suggested that such a power existed. On the contrary, note the approval of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102, a *Crumpler decision; Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389; and *Russell* v.

Sebastian, 233 U.S. 195, 58 L. ed. 912. Compare *Fleming* v. *Nestor*, 363 U.S. 603, 620, 4 L. ed. 2d 1435, 1451. The *Lynch Case* involved not contract impairment but Fifth Amendment due process.

2. 16A *C.J.S.*, "Constitutional Law", Motion p. 6. With deference, note that further said therein, p. 696:

> "* * * The effect of the guaranty is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing."

In Section 599, p. 698, it is further said:

> "The term 'property' within the constitutional guaranty against the deprivation of property without due process has been held to include various items of property, and various rights, such as a choses in action; a contract; a franchise; * * *."

And in Footnote 22, p. 699:

> "Impairment of franchise see infra Sec. 605.
>
> "Public utility's franchise rights constitute 'property rights' within protection of due process clause."

Section 605, p. 729:

> "It is a violation of the constitutional inhibition against the taking or deprivation of property without due process of law for a legislative body to control or destroy, by subsequent legislative action, property rights which have legally vested under grants or franchises, unless power for that purpose has been duly reserved."

The requisite reservation was not under discussion. Compare *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389, approved in *Southern Bell Tel. & Tel. Co.* v. *Meridian*, 241 Miss. 678, 131 So.2d 666, 673.

3. *Fox River Paper Company* v. *Railroad Commission of Wisconsin*, 274 U.S. 651, 71 L. ed. 1279, Motion p. 6. Primarily, the right to review is expressly sustained when this Court said therein, 274 U.S. 653, 71 L. ed. 1282:

> "The right set up in the bill is one under the Federal Constitution. Whether the state court denied that right or failed to give it due recognition is a question upon which the plaintiffs are entitled to invoke the judgment of this Court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law. * * *."

As to riparian rights, this Court said, 274 U.S. 655, 71 L. ed. 1283:

> "* * * the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state * * *."

But that was a Fourteenth Amendment case basically and not an impairment case. Were it an impairment case, the power of the contracting party to contract and the terms of the contract are with this Court ultimately and thereasto the State Court cannot oust the impairment jurisdiction by a conclusive determination manifestly contrary to the express terms of the contract as precedently adjudged both in the State Court and in this Court. The State Court has solemnly adjudged that the whole (the municipality) does not, during the contract period, embrace all of its parts—an obvious *non sequitur*.

With deference, in 1956, the disputed area unquestionably lay outside of the municipality; but it was the obligation of the State to validly afford power and light and to effectuate, it had authorized that to be done through

its agency. Compare *Walla Walla* v. *Walla Walla Water Company*, 172 U.S. 1, 43 L. ed. 341. When the State had authorized its agency, for whom it was responsible, to grant a franchise within the municipality as it should exist between 1948 and 1973, the Legislature had, as said in *Fletcher* v. *Peck*, 6 Cranch. 87, 3 L. ed. 162, 178:

> "* * * A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant."

For the State to authorize all municipal franchises for a definite period and then to attempt to take from Appellant and give to Appellee a segment of the municipality without Appellant's consent amounted to an attempted repeal of the grant made to Winona to cover the entire municipality within the franchise as granted and as it would continue until 1973—when Appellant would have had again to purchase from Winona. Let it be noted, a certificate of convenience and necessity may be repealed by the Legislature without impairment (see *State ex rel. Hutton* v. *City of Baton Rouge*, (1950) 217 La. 857, 47 So.2d 665, 668-670; compare *Wheeling & B. Bridge Co.* v. *Wheeling Bridge Co.*, 138 U.S. 287, 292, 34 L. ed. 976; *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 76 L. ed. 747, especially dissent of Mr. Justice Brandeis); and it was the contention of the municipalities and of this Appellant that this right thus to obtain franchises from the municipalities would continue. The Constitution will not allow the State to grant a certificate and exclude Appellant from an area which the State had validly contracted that the Appellant could occupy when it became within the municipal limits.

In *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808, the grant by the State to Vicksburg was the prototype of that given the municipalities herein. In

that case, the municipality granted a thirty-year franchise and embraced therein "the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended," and also "within such other territory as may now or hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction," (185 U.S. 69-70). After fourteen years of performance (performance as to Winona has been since 1948 and is continuing), the Court said, 185 U.S. 81:

> "* * * The subject-matter of the contract was within the powers of the city to make; the terms were explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied with without question or complaint, for a period of fourteen years.
>
> "After the lapse of that long period and the continuous acquiescence of the city in the contract as a valid and subsisting one, the city, according to the allegations of the bill, now insists that the said contract was invalid because in excess of its powers to contract, and is proposing to borrow money to erect and maintain waterworks of its own, and become a competitor with the complainant for the custom of the consumers of water. And the question for our consideration is whether the subsequent legislation, state and municipal, set forth in the bill, impairs the contract rights of the complainant within the protection of the Constitution of the United States."

And this Court held it did. But after this specific declaration here, how unconvincing does this declaration of the Mississippi Court sound, Motion p. 8:

> "* * * When they were executed by the City, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the City. Winona's power was con-

> fined to its corporate limits. The City had no extra-territorial power of any kind to grant company any rights in the disputed area when the contracts were executed.' "

The statutes of Mississippi—the Mississippi Court to the contrary, notwithstanding—authorized Winona to contract for a franchise for the municipality—the entire municipality—for twenty-five years. Note the definition of "municipality" in Section 5527, *Recompiled Mississippi Code of 1942*:

> "(a) The term 'municipality' shall mean any county, incorporated city, town or village in the State of Mississippi."

See also Section 5956-02(d). When the Legislature used the word "municipality", it meant the municipality and all of its parts. Compare Sections 3398-3400, 3402-3423, 3425-3461, 3463, 3465-3469, *Mississippi Code of 1942*.

The basic argument is that when the State had authorized that to be done in manner and form as it did authorize, and its agency, under its complete domination and control so long as contract rights were not involved, had acted to make this contract, it simply cannot be, with deference, that the State can repudiate.

4. The Court declared as to this contract, as quoted by Appellee, Motion p. 8:

> "'* * * The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta (appellee here) by the Commission under the Act attached to the disputed area.' 149 So.2d at 513-14."

The State could not, having authorized as it did, disable itself and repudiate that which its agent had validly pro-

vided. Ever since the municipalities had been thus entrusted with power, every franchise that has been granted has consistently expanded or contracted under the power granted, and had the Act not been passed and construed as it most wrongfully was, there would never have been any such miscarriage as the Constitution must now rectify. Under the *Crumpler Cases, supra*, the water company's franchise ordinance was a contract from the date of its inception; and, being a contract entitled to constitutional protection, the State might not donate that therein granted to another. At least, that is the question here for this Court.

5. *Cobb* v. *City of Malden*, 105 F. Supp. 109, Motion p. 8. This case was modified in 202 F. 2d 701 and was cited by this Court in *Monroe* v. *Pape*, 365 U.S. 167, 5 L. ed. 2d 492, 507; but naught therein is contra.

6. *Pearsall* v. *Great Northern R. Co.*, 161 U.S. 646, 40 L. ed. 838, Motion p. 9. This case holds, p. 849:

> "In conclusion, we hold that where, by a railway charter, a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads, which has remained unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease, or consolidation with parallel or competing lines."

In accordance with *Stone* v. *Mississippi*, 101 U.S. 814, 25 L. ed. 1079, a general law prohibiting acquisition of a competing carrier was clearly within the police power. See also *Yazoo & M.V.R. Co.* v. *Southern Ry. Co.*, 83 Miss. 746, 36 So. 74.

7. *Ochiltree* v. *Iowa R. R. Contracting Co.*, 21 Wall. 249, 22 L. ed. 546, Motion p. 10, is fundamentally dif-

ferent, in that the party sought to be made liable came into the contract relationship after the repeal of the provision of the Constitution. In our case, the State authorized its agency to contract as to its boundaries and that within those boundaries the franchise would be available. It vested in the municipalities the right to expand or contract, but the provision in the contract was for the entire municipality; and to allow the State to withdraw a fundamental portion of that within the boundaries from the contract is that wherein the impairment is.

8. *Pearsall* v. *Great Northern R. Co.*, 161 U.S. 646, 40 L. ed. 838, Motion p. 12, has been dealt with *supra*. Additionally, if the State could do or leave undone at its pleasure without liability, there would be no contract and neither party would have been bound. Compare 12 *Am. Jur.*, "Contracts", Sec. 24, p. 521, Sec. 66, p. 558; 17 *C.J.S.*, "Contracts", Sec. 318, 736; and A.L.I., *Restatement of Contracts*, Sec. 32. Sp. *Vicksburg Waterworks Co.* v. *Guffy Petroleum Co.*, 86 Miss. 60, 38 So. 302.

9. No complaint is made of *Stone* v. *Mississippi*, 101 U.S. 814, 25 L. ed. 1079; *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 78 L. ed. 413 (Motion p. 13), last cited in *Baker* v. *Carr*, 369 U.S. 186, 7 L. ed. 2d 663, 684. Naught was taken from the promisee therein but time for payment was altered to conserve the public welfare. Here, the entire disputed area is excluded absolutely from Appellant's contract. In the *Blaisdell Case*, *supra*, not a jot or tittle was withdrawn from the performance of the obligation—only conservation for emergency occurred.

10. *Veix* v. *Sixth Ward Bldg. & Loan Association*, 310 U.S. 31, 84 L. ed. 1061, Motion p. 13. Therein this Court held, under then existing circumstances as to fi-

nancial welfare, a change by general statute as to withdrawals could be made when requisite to preserve the financial solvency of the community. This we have not questioned and thereasto in the case cited, it was specifically said, 310 U.S. 40, 84 L. ed. 1067:

> "Appellant relies upon Treigle v. Acme Homestead Asso. as a determinative precedent in support of his argument that the withdrawal arrangements between the association and appellant were contractual and secure from impairment by the statutory exercise of the paramount police power of the State. In that case statutory changes as to the right of withdrawal, similar to these involved here, had been made after the purchase of the shares. The enactment in the Treigle Case occurred after notice of withdrawal. From all the circumstances of the Louisiana building and loan situation at the time of the legislation attacked in the Treigle Case this Court reached the factual conclusion that the withdrawal amendment to the building and loan statutes was directed merely toward a private right and not deemed in the public interest.
>
> "It is to be noted that this Court was careful to point out in the Treigle Case that where the police power is exercised 'for an end which is in fact public' contracts must yield to the accomplishment of that end."

As to the factors requisite to validate police power imposition, note *Jefferson Standard Life Insurance Company* v. *Noble*, 185 Miss. 360, 188 So. 289, 293:

> "Let it be remembered that the contract clause of the Federal Constitution originated in an economic and financial emergency, which obtained following the Revolutionary period, and the legislatures had passed ignoble schemes for the defeat of creditors and the invasion of contractual obligations; and was adopted to 'inspire a general prudence and industry,

and give a regular course to the business of society'. See Blaisdell case, supra (290 U.S. 398, 54 S. Ct. 236).

"So far as credit is concerned, looking to the welfare of the whole State, it is vitally important that unnecessary and uncalled for restrictions be unloosed and contracts made with impunity and confidence: that fear, suspicion, and distrust may be obviated."

11. *East New York Savings Bank* v. *Hahn*, 326 U.S. 229, 90 L. ed. 34, Motion p. 14, contains naught contra.

B. Capital Association's authorities:

1. Counsel quote 3 *Cyclopedia of Federal Procedure*, 3rd Ed., Sec. 6.14, Motion p. 15, but they have made no attempt to reconcile the Mississippi decisions made the basis of the decisions in this Court in the *Crumpler Cases*, *supra*, and it is fundamental that where there is a Federal question, it must be solved here. It was so expressly held in the *Crumpler* litigation and has not been in any way invalidated. As to State questions, this Court could, if it were requisite, remand for appropriate determination. *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 358 U.S. 639, 3 L. ed. 2d 562, 241 Miss. 678, 131 So.2d 666.

2. Naught contra is to be found in *Albertson* v. *Millard*, 345 U.S. 242, 97 L. ed. 983, Motion p. 16. We are here for an application of the Constitution to that which has been assumed to be adjudged by the inferior State Court; and the sole issue here is: is there such a Federal question as could possibly be made the predicate for a reversal of the State's construction and a validation of Appellant's claims under the Constitution?

3. *United States* v. *Burnison*, 339 U.S. 87, 94 L. ed. 675, Motion p. 16, followed *United States* v. *Fox*, 94 U.S.

315, 24 L. ed. 192, and merely held that testamentary disposition was absolutely controlled by the State and the United States could not take under a will which the State had not authorized. Applied in *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 7 L. ed. 2d 285, 291; *United States* v. *Oregon*, 366 U.S. 643, 6 L. ed. 2d 575, 580, 582.

4. As to 16 *C.J.S.*, "Constitutional Law", Sec. 281, Motion p. 19, this principle has been differentiated *supra*, whereto we make reference.

5. Naught contra is found in *United Gas Corp.* v. *City of Philadelphia*, 238 Miss. 409, 118 So.2d 618, Motion p. 20; the holding was based on a specific reservation of the power to amend in the rate ordinance—as our Court said—"according to the very terms of the franchise it remained in effect only so long as the rates were fair and reasonable *or until changed as provided by law*" (118 So.2d 619).

IV.

THE REA ACT.

We, with deference, challenge the declaration of counsel that as public utilities Appellant and Appellees are upon precisely the same basis. Appellees are a Federal agency, financed by the United States to meet conditions obtaining nationally after the depression. Appellant and the other private investor utilities had been through this ordeal; and when Congress originated this plan and it was explained by those who assumed to speak with authority, Appellant and those similarly circumstanced acquiesced therein upon the assurances thereinto written, after the legislative history quoted at length in the Jurisdictional Statement.

Appellant now finds itself attacked by an REA Association. That Association, contrary to the Federal Act, is the sole protagonist which has wrenched from Appellant that which, with deference, Appellant believed was to it vouchsafed, with the State of Mississippi and the municipalities not appropriately parties. The financial condition of these Associations does not appear in the record; and before this Court for the first time a privately-owned utility is thus assaulted. That whereon we respectfully insist is that Appellant is entitled to protection. We submit that Appellees have not adequately answered that which we propounded to this Court under this point for solution. As said in our Jurisdictional Statement, p. 37:

> "The interplay between Federal and State power in a question of this character can only be solved here. * * *. Behold, contrary to the Contract Clause and the Due Process Clause, that which was Appellant's is now Appellee's under the statute."

CONCLUSION.

It is respectfully submitted that the Motions to Dismiss should be overruled. There are vital Federal questions which inhere; and that at issue is, in part, whether or not that said by this Court is still constitutionally protected? This Court said in *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 515, 51 L. ed. 1155:

> "In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg, the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, * * * and, * * * this action of the council is binding and for the time limited

puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party."

In *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65. 81, 46 L. ed. 808, 815, this Court said:

"• • • And the question for our consideration is whether the subsequent legislation, state, and municipal, set forth in the bill, impairs the contract rights of the complainant within the protection of the Constitution of the United States.

• • •

"• • • the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question."

Appellees demand that the basic rights existent in 1886 and expressly relied upon when these contracts were formulated in 1948 be declared now *un*protected by the Federal Constitution. If they so be—and we assert they are still protected—it is vitally necessary that this Court should overrule these Motions and award a hearing upon the merits as this Court alone is competent thus to do. Repudiation by the State would be a criminal act, but repudiation by an interloper—not in privity—is unthinkable. This is especially so when the Public Service Commission, assuming to destroy Appellant's property and cancel its all-requirements contracts, considered the franchises and contracts not germane and thereasto specifically declared:

"• • • We do not consider the municipal franchise granted Mississippi Power & Light Company by the City of Winona to be germane to any of the issues in this cause. Therefore we have disregarded the fran-

chise completely as we believe it has no bearing on the case. * * *."

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APPENDIX "A"

No. 42,535

IN THE SUPREME COURT OF MISSISSIPPI
DELTA ELECTRIC POWER ASSOCIATION

v.

MISSISSIPPI POWER & LIGHT COMPANY, ET AL

ETHRIDGE, JUSTICE:

This case involves an order of the Mississippi Public Service Commission (called Commission), directing Mississippi Power & Light Company (called Company) to cease and desist from rendering electric distribution service or street lighting service in a newly annexed area of the City of Winona, which was certificated by the Commission to Delta Electric Power Association (called Delta). The Mississippi Municipal Association was allowed to intervene. It supported the position of the Company.

The Company and Municipal Association appealed from the Commission's order to the Chancery Court, First Judicial District of Hinds County, which reversed it. That court held that Delta had no right to operate in the disputed area, and ordered Delta to cease and desist from doing so. It adjudicated that the Company's municipal franchise, upon expansion of the city limits, extended into the newly incorporated area, and thereby superseded Delta's certificate from the Commission, issued when the disputed area was outside the city limits.

The facts are without any substantial dispute. The issues are principally those of construction of Section 5 of

the Public Utility Act of 1956, in the light of the facts and several prior decisions. Miss. Laws 1956, Ch. 372; Miss. Code 1942, Rec. Secs. 7716-01 to 7716-38. We conclude the Commission's order was correct, reverse the decree of the Chancery Court, and reinstate and affirm the Commission's issuance of a cease and desist order.

The precise issue is whether, under the Act, the expansion of the city limits extended Company's service area into the annexed area, under its municipal franchise granted prior to the 1956 Act and before the expansion, and superseded the prior grandfather certificate to the annexed tract, granted by the Commission to Delta, which served the area before it came within the city limits. We think it did not, and that Delta's certificate was properly protected by the Commission's order.

Both Delta and Company are public utilities engaged in the transmission and distribution of electricty, and subject to the Public Utility Act of 1956. Miss. Laws 1956, Ch. 372, Sec. ID. Delta is a Mississippi corporation organized and operating under the Electric Power Association Act of 1936. Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is vested with authority to operate electric services both within and without municipalities. Code Sec. 5474 (8). It has the power of eminent domain. Sec. 5474 (6) (14). Delta has the obligation and duty to render non-discriminatory service to all persons subscribing for it, who live in the areas served by that corporation. Capital Elec. Power Assn. v. McGuffee, 226 Miss. 227, 83 So.2d 837 (1955). It operates in thirteen counties in the state.

Mississippi Power & Light Company, a subsidiary of Middle South Utilities, is incorporated under the laws of Florida, and qualified to do business in Mississippi. All of

its property is located in this state, generally in the western one-half from the Tennessee to the Louisiana line.

Delta was incorporated in 1938. In 1940 it constructed an electric line in the vicinity of, but outside the west corporate limits, of the City of Winona. There were no other electric lines in this area, and electric services was not then available to anyone in this rural area. Delta served the only two customers in it who desired electricity at that time. After it was made available, and as a result of this and other factors, this area west of the city limits slowly developed, over a period of years, and Delta obtained other customers. It served all of these additional customers.

On February 23, 1948, the City of Winona granted a franchise to Mississippi Power & Light Company for electric service in that municipality, its streets and public places, "as they now exist or may hereafter be laid out or extended." This franchise was for a period of twenty-five years, so it expires in 1973. Since 1948 Company has been furnishing electric service in Winona under that franchise. During this same period and since 1940, Delta has been furnishing electric service to those desiring it in the disputed area which was west of the city limits prior to December 31, 1959.

In 1948 the City made a street lighting agreement with the Company, for five years, and renewable for similar additional periods unless either party elected to terminate it. That contract is still in effect.

The Public Utility Act became effective on March 29, 1956. Miss. Laws 1956, Ch. 372, Sec. 40. Before that date there was no statewide regulation by the Public Service Commission or any other state agency of the service areas, rates, or related operations of electric public utilities. Subject to certain limitations, the act vested "exclusive orig-

inal jurisdiction" over these matters in the Commission. *Ibid.*, Sec. 4.

Section 5(b) provides for grandfather or prior service certificates of convenience and necessity. It states that the Commission shall issue such a certificate to any person engaged in the operation of electric facilities and equipment "for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation," if the application was made within six months after the effective date of the act. Both Delta and the Company filed applications within the six months, and thereafter negotiated over a lengthy period for the purpose of agreeing on areas which they should recommend to the Commission for certification to Delta and Company, respectively. They agreed that the disputed area involved in this suit should be certificated to Delta and that certain other areas should be certificated to Company. Hence they submitted to the Commission a letter of agreement and map showing the recommended areas of agreement for prior service certificates.

On November 25, 1959, all of the disputed area involved in this suit was certificated to Delta. The Company was a party to that proceeding, did not appeal from it, and the Commission's order, granting the grandfather certificate to Delta, became final. Delta has continued since that date to serve every electric customer in the area, including two street lights for the City of Winona. Delta's grandfather certificate from the Commission describes the disputed area involved in this suit by metes and bounds, and clearly covers it.

By an ordinance effective December 31, 1959, the City of Winona extended its corporate limits to the north, south,

and to the west. The disputed area here involved is part of the western expansion of the city limits, annexed on that date to the municipal boundaries of Winona.

In May, 1960 the Company, without any authorization from the Commission, constructed an electric line into the disputed area, previously certificated by the Commission to Delta, extended it to the Hightower property, and in June, 1960 constructed two prongs from this line in the disputed area for the purpose of serving street lights. No electric service was actually rendered to the Hightower property. The street lights were operated for several weeks, when the bulbs were removed.

On May 31, 1960 Delta filed the present petition before the Commission, asking it to order the Company to remove its line from Delta's area and to cease and desist offering its electric service to service locations within areas certificated to Delta. The Company filed its answer and cross-petitioned. It took the position that extension of the city limits expanded its precedent franchise from the city to cover the newly annexed area.

After a lengthy hearing, the Commission's supplemental and amended order of July 18, 1961 ordered the Company to cease and desist from offering electric service and operating facilities within the disputed area. It denied the cross-petition. The Commission found that Delta's certificate of November 25, 1959 contained a particular legal description of the area certificated to Delta, which included the disputed area; that the Company did not appeal from the order granting Delta that certificate; that since March 29, 1956 Delta has been rendering reasonably adequate electric service within the disputed area; and the Company's certificate did not include any part of that area certificated to Delta. The Commission stated it

did not consider the municipal franchise granted to the Company by Winona to be germane to the issues, and did not pass upon the validity of that franchise. It ruled solely on the respective rights of the parties arising out of their certificates of convenience and necessity.

I.

Prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of grandfather certificates under Section 5 are made on an area rather than a facility basis; (2) A certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts.

An electric power association is under an obligation to render electric service upon a nondiscriminatory basis to its members and to other persons living in the area. Capital Electric Power Assn. v. McGuffee, 226 Miss. 227, 243, 83 So.2d 837, 84 So.2d 793 (1956). A non exclusive franchise is a valuable right which can be protected in the courts. Miss. Power Light Co. v. Miss. Power District, 230 Miss. 594, 611, 93 So.2d 446 (1957); Payne v. Jackson City Lines, Inc., 220 Miss. 180, 70 So.2d 520 (1954).

In Miss. Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 106 So.2d 375 (1958), it was held that a revenue bond issue, to provide funds for acquisition of electric distribution facilities in a municipality, was void because of defective notice. Whether an electric power association should be permitted to "invade an area" already having electric utility service furnished by the company was first for determination by the Commission. The opinion discussed briefly Section 5 of the Act, recognized the right under Section 5(b) to a grandfather certificate, and ob-

served that under the second paragraph of Section 5(d) provision is made for more than one utility operating within a municipality. 234 Miss. at 634.

United Gas Corp. v. City of Philadelphia, 238 Miss. 409, 118 So.2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946 the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature "reserved the right to pass such laws as may be expedient or necessary in municipal affairs." The 1956 Act superseded pro tanto the precedent franchise to United. The legislature, acting under its police power, had the right to vest in the Commission power to determine rates.

Capital Electric Power Assn. v. Miss. Power & Light Co., 240 Miss. 139, 125 So.2d 739 (1961) (called the Elton case), spelled out in some detail the rights of a holder of a certificate of public convenience and necessity from the Commission. The Elton Company operated a wood-shipping plant three miles south of the City of Jackson. Capital Electric had been serving the area for 17 years, and obtained from the Commission a grandfather certificate under the 1956 Act, which covered the area involved. Nevertheless, Miss. Power & Light Company applied for a certificate to construct lines to Elton, pursuant to its contract with it. The Commission's issuance of a certificate to Mississippi

Power was affirmed by the circuit court, but on appeal that judgment was reversed.

Section 5 of the Act was discussed in some detail. Capital Electric was "obligated to render non-discriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor." Hence it was said that, having served the electric requirements in this area for 17 years, Capital Electric under Section 5(b) acquired the right to a certificate, "being in truth and in fact a franchise from the State. Such right is indeed a valuable one", although nonexclusive. By the Act "it was the intention of the legislature that facilities of one utility should not be duplicated in the same area"; that there should not be "duplication and overriding facilities and certificates." Hence it was said "An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear."

For emphasis, it was stated: "There should no longer be any doubt as to the rule in this State on that proposition." The Commission could not disregard the requirements of a grandfather certificate under Section 5(b). In summary, the opinion held: "To allow the invasion of Capital Electric's area on account of the desire of Elton Company, regardless of their reasons therefor, to be served by Mississippi Power & Light Company would lay down a principle which would result in endless duplication and make a shamble of the utility act. Such a policy cannot be countenanced by this Court."

Miss. Power Co. v. East Miss. Elec. Power Assn., 140 So. 2d 286 (Miss. 1962), involved principally an area within

one mile around and adjacent to the City of Louisville. Louisville's Electric System contended that, under Sec. 1H of the Act, it had the sole right and privilege of operating within the one mile corridor. That provision stated that any public utility owned by a municipality should not be subject to the provisions of the Act, except as to extensions of utilities greater than one mile outside of corporate boundaries after the effective date. This provision was not a grant, but an exemption from regulation, limited in terms.

East Mississippi had been serving the outside area prior to and on the Act's effective date. It was held the legislature did not intend by this exemption "to take from a company that was operating within said corridor on the date of the Act its right to operate therein," and the Commission was justified in certificating the area to East Mississippi. Whether its certificate could be invaded depended upon whether the Commission found it rendered inadequate service, and failed to remedy it. The award of a certificate, it was held, is made on an area rather than a facility basis. *Capital Electric* so held. Moreover, East Mississippi was a public utility in statutory contemplation. Cf., Miss. Public Service Commission v. Holloway Transfer & Storage Co., No. 42,476, decided January 14, 1963 (Motor Vehicle Act).

In short, prior decisions under the Public Utility Act of 1956 hold that certificates to public utilities are based on an area basis, are valuable rights, although nonexclusive, entitled to protection of the courts, and the Commission (under Section 4) has "exclusive original jurisdiction over the intrastate business and property of public utilities." Cf., Miss. Code 1942, Rec., Secs. 5490-5497 (1938 preemption statutes for power assns.)

II.

Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not Consistent with the terms of the Act or with the legislative purposes.

The title of Ch. 372, Laws of 1956, states it is an act to "vest authority" in the Commission "to regulate certain public utilities." The preamble reveals legislative concern with utility services "both within and outside of municipalities," and the purpose to vest controlling power in the Commission "to regulate such utilities' rates and services." Section 4 gives it "exclusive original jurisdiction," with certain exceptions. There is no indication that a municipal expansion of boundaries would supersede a prior certificate from the Commission.

Subsection (d) of Section 5 is aimed at the precise issue involved here: "Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for ex-

tension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. . . ."

Subsection (d) recognizes that two public utilities, such as Delta and Company, may hold certificates for similar operations in the same municipality. It authorizes operations to be carried on by them "within their respective certificated areas," and exempts them from further application for extension of their facilities within their "respective certificated areas of said municipality, including any extensions of the corporate limits thereof." In other words if such utilities extend or add to their facilities within their respective certificated areas of the city, which would include extensions of corporate limits of the city, they are exempt from further application to the Commission for such extensions or additions. This assumes the annexed areas are within the respective certificated areas of the two utilities.

The second paragraph of subsection (d) recognizes that both "co-operatives" and other utilities may operate within a municipality at the same time, and in such event they are subject to rate regulation. In short, subsection (d) specifically applies to and recognizes the existence of a situation such as that here presented, where Delta and the Company have respective certificated areas in the municipality, under the extension of the city limits. Section 5 (d) applies to certificate holders for areas subsequently annexed to municipalities. This is evidenced from the phrase, "including any extensions of the corporate limits thereof."

Subsections (b), (c), and (d), of Section 5, must be read together. Subsection (b), mandatory in nature, requires the Commission to issue a grandfather certificate where a person, as defined, is engaged in the operation of facilities on the effective date of the Act, March 29, 1956. Subsection (c) provides that "in all other cases" the Commission shall have a hearing on certificate applications, "provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality *being served by the holder of a certificate of convenience and necessity*, . . ." (emphasis supplied) Hence if there is only one holder of a certificate within a municipality, then it can construct extensions anywhere in the corporate limits without further application to the Commission. However, under subsection (d), where there are two holders of certificates in the same municipality, then each holder is only exempt from further application to the Commission for extensions *within its own certificated area* of the municipality.

The quoted part of subsection (c), upon which Company relies, must be considered along with subsection (d). When read together, the foregoing interpretation renders both subsections consistent with one another, the terms of the statute, and a reasonable exercise of legislative discretion. Accordingly, under subsection (d), when there were two persons holding valid certificates for electric operations in separate areas in Winona, as extended, these certificate holders had the right to carry on their operations in their respective certified areas within the municipality, without making further application to the Commission for extensions and additions of their facilities, within their respective certificated areas.

The reference in subsection (d) to "respective certificated areas" reflects a legislative intent to exempt the

holder of a certificate, and not the holder of a municipal franchise. Throughout Section 5, the statute uses the words "certificate" and "franchise" correctly and distinctly. If the legislature had intended to exempt the holder of a municipal franchise, then it would have used the term "municipal franchise" instead of the word "certificate." When it referred to extensions "within their respective certificated areas," it intended areas which had been certificated by the Commission, not areas for which a municipal franchise only had been issued. If it had intended the latter, it would have said so.

Furthermore, subsection (b) made it mandatory for the Commission to issue a certificate to Delta for the areas it was serving outside the then corporate limits of Winona. The legislature knew that corporate limits sometimes expand. If it had intended the Commission should not issue certificates for areas near corporate limits, in view of possible future expansions, then presumably it would have so stated, and not used the mandatory language of subsection (b).

The phrase "municipal franchises" is used numerous times in Section 5. Yet it does not provide that when a certificated area is taken within a municipality, the Commission's certificate would be cancelled. The clear inference is that the legislature did not intend that result. Moreover, there is no provision that, after a certificate has been issued by the Commission, it shall be necessary, after corporate limits are extended, for a municipal franchise also to be obtained.

Nor is there any direction that a municipal expansion shall cancel or in any way affect a Commission certificate. The exclusive method for cancellation of such a certificate is prescribde in subsection (f), Section 5, where a utility is

not rendering reasonably adequate service, and fails to do so after ordered to correct it. Yet Company's argument would add an additional ground for cancellation of a Commission certificate, namely, where a municipality has extended its corporate limits into a previously certificated area. The statutory expression of one method for cancellation of certificates is justly to be construed as an exclusion of other methods. 50 Am. Jur., Statutes, Secs. 244-46; Tepper Bros. v. Buttross, 178 Miss. 659, 664, 174 So. 556 (1937).

The next to last sentence of subsection (e) contemplates power associations operating within a city and paying for that privilege. It says that any co-operative operating "within *any area* of a municipality" shall pay it two percent of gross revenue from inside sales. Furthermore, the first sentence of Section 5 provides that no person shall construct, acquire or operate equipment for distribution of electricity "without first having obtained from the Commission a certificate." There is no exception which would authorize a municipality, by issuing a franchise, to excuse this requirement of a certificate.

Subsection (e) recognizes that a public utility, which holds "a certificate of convenience and necessity granted under the provisions of this act covering the geographical area of such municipality," may after the expiration of a "municipal franchise" continue to use the streets upon condition of payment of compensation therefor at the rate of two percent of sales to customers within the city. Nevertheless, the utility must have a certificate from the Commission.

Subsection (g) of Section 5, upon which Company particularly relies, has a restricted application. It constitutes a limitation on the Commission, as of the time of issuing

a certificate, for an area which at that time is in a municipality. It prohibits the Commission from issuing to a utility a certificate for an area *then* in a municipality, unless the utility has a franchise from the municipality. It presupposes the pending application is for a certificate. Here Delta is not seeking a certificate for any service territory. It already has a valid certificate covering the disputed tract, granted to it by the Commission before the expansion of the city limits, and at a time when no part of the area was within the corporate limits.

Subsection (g) also presupposes that an applicant for a certificate within a municipality has a municipal franchise, which it must attach to its application. Moreover, it does not require that any further application be filed after a certificate is once granted by the Commission. This construction is further supported by the third sentence of subsection (g). It states that if a municipality arbitrarily refuses to grant a franchise to a utility "now operating within said municipality," then the utility can obtain a Commission certificate for a municipal area without having a franchise. See Miss. Valley Gas Co. v. City of Jackson, 236 Miss. 81, 109 So. 2d 637 (1959). The phrase "now operating" refers to the effective date of the Act, March 29, 1956. No similar relief was provided for a utility holding a certificate for an area outside of a municipality, which is taken into it after that date, and the franchise arbitrarily is denied. This omission warrants the conclusion the legislature intended that, when a certificate was once validly granted, (as it was to Delta), it would remain valid even though the area was subsequently annexed by a municipality; and that such annexation would not make it necessary for the utility to apply again for the area already certified to it. If that were not so, the legislature as a matter of equality would have afforded presumably the same

relief from arbitrariness to a utility whose certificated area was brought into a city by a municipal expansion.

III.

In the drafting of Section 5 of the Act, the legislature was aware manifestly of municipal franchises, Commission certificates, and extensions of corporate limits. It mentioned all of them in the Act. If it had intended that extension of municipal limits would cancel, modify, or affect in any way a certificate of convenience and necessity from the Commission, it no doubt would have provided for such cancellation. There is no such directive. To read into the Act a requirement that any extension of municipal limits would cancel *pro tanto* a certificate from the Commission would be unwarranted.

Moreover, it would impute to the legislature an intent inconsistent with its purpose to avoid duplicating facilities The dominant policy which the legislature had in view must be considered. See Zeigler v. Zeigler, 174 Miss. 302, 310, 164 So. 768 (1935); Sheffield v. Reece, 201 Miss. 133, 143, 23 So. 2d 745 (1947); Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 510-511, 62 So. 2d 772 (1953). This maintains the *status quo* in the disputed area.

Subsection (d) authorizes two electric utilities to serve separate certificated areas in the same municipality. This would result in no duplication or inconvenience, the legislature apparently concluded, although the contrary might well be the case where two transit companies are serving in one city. At any rate, subsection (d) of Section 5 makes it clear that two utilities may hold certificates from the Commission for separate areas in the same municipality. The legislative history in the Senate, as reflected in the Journal, is too sketchy and indefinite to be of assist-

ance in the Act's interpretation on the present issues. Miss. Senate Journal, 1956, pp. 327, 329, 353-359, 391, 405-408, 510, 540-542, 575. Moreover, the statute as finally enacted is the controlling guide.

A municipality in Mississippi is a creature of the State. It has only such power and authority as may be granted to it by statute. Adams v. Kuykendall, 83 Miss. 571, 590, 35 So. 830 (1903). The powers given municipalities to grant utility franchise and the right to use their streets and public places are subject to legislative control. Miss. Code 1942, Rec., Secs. 3374-73, 3374-85, 3374-119, 3374-120, 3374-129. The same applies to the power to extend municipal boundaries. Code Secs 3374-10 to 3374-16. Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands, subject to regulation.

All of these statutes must be read together, and in the light of the subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, the Act modifies them. All were enacted under the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d (1952). We do not consider or decide any issues unnecessary for the decision of this case. We hold that expansion of the city limits of Winona into the disputed area, coupled with the franchise and street lighting contract from Winona to Company, did not supersede Delta's certificate from the Commission to serve the disputed area. That certificate was issued before the area was within the municipal limits. The city at that time did not have any jurisdiction or power over this territory. Its franchise and street lighting contract, at the time of their execution, could not preclude the legislature from exercising its plenary police power

over areas then outside of municipalities, nor its power to control and regulate municipal activities.

Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. They have no extraterritorial application, except when the sovereign gives them that effect. Anno., 13 Am. & Eng. Ann. Cas. 136 (1909).

A municipality's power over its streets is derived from the state, which has plenary control over them, including the right to grant the use of streets to others. So. Bell Tel. & Tel. Co. v. Meridian, 241 Miss. 678, 131 So. 2d 666 (1961). Code Sec. 2780 granted that right to Delta in the disputed area long before the annexation. After that event, the governing body of a municipality has the right to regulate reasonably the manner in which Delta's lines and appliances are constructed and maintained, subject to the original, primary jurisdiction of the Commission over all services and facilities of public utilities under the 1956 Act.

IV.

Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted Company by Winona when the disputed area was not within the corporate limits, vested in Company rights in that area, which was then outside of municipal limits. When they were executed by the city, no statute of this state authorized Winona to

grant a franchise or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant Company any rights in the disputed area when the contracts were executed.

On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise of the police power of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26 (d) (scope of review).

There was no error in the Commission's overruling Company's plea to its jurisdiction, and the motion to dismiss Delta's petition. Appellant did not seek any relief against the City of Winona. It only sought an order directing Company to remove its lines in the disputed area, relying upon its certificate from the Commission. Hence the city was not a necessary party to the suit. Moreover, at Company's instance, the Commission struck from Delta's pleading allegations attacking validity of the franchise, and properly ruled that it had no power to pass upon that issue.

Stegall v. City of Jackson, 141 So. 2d 236, 143 So. 2d 298 (Miss. 1962), does not affect this case. It held only

that land developers who, without authority, laid sewer lines in streets and county roads, without any recorded reservation, dedicated that system to the public use, and could not recover its value from the city which annexed the area. However, *Stegall* (141 So. 2d at 241) referred to Gwin v. City of Greenwood, 150 Miss. 656, 115 So. 890, 58 A.L.R. 849 (1928), which has some relevancy here. There the owner of a subdivision outside of the city limits dedicated the streets, but reserved the exclusive right to operate water and sewer lines thereon. Later the city extended its boundaries to include this area. It was held the municipality had no right to enjoin Gwin from interfering with its extension of water mains. The reservation in the dedication reserved in the dedicator a private right of property, when the reservation was made before the area was brought into the city limits.

Appellees argue as analogous precedents from other states several cases in which municipalities have extended their boundaries, affecting previously acquired utility rights in the annexed area. Farmers Electric Co-op. Corp. v. Ark. Power & Light Co., 220 Ark. 652, 249 S.W.2d 837 (1952), but changed by Ark. Laws 1955, Act. No. 85, and Ark. Laws 1957, Act. No. 103; Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.2d 695 (1944); Omaha Transit Co. v. Briggs, 167 Neb. 703; 94 N.W.2d 461, 28 PUR 3d 26 (1959); Whitaker v. Louisville Transit Co., 274 S.W.2d 391 (Ky. 1954); Rosehill Cemetery Co. v. Chicago, 352 Ill. 11, 185 N.E. 170 (1933); Deneen v. Houghton Co. St.-Ry. Co., 150 Mich. 235, 113 N.W. 1126, 13 Am. & Eng. Ann. Cas. 134 (1907); Public Service Co. v. Public Utility Comm. of Colo., 142 Colo. 135, 350 P.2d 543 (1960); Clarke-Washington Elec. Membership Corp. v. Ala. Power Co., 272 Ala. 598, 133 So. 2d 488 (1961). These cases are not persuasive here. They are based essentially upon the particular statutes and constitutional

provisions of the specific states. They involve issues and statutes different from those arising under the Public Utility Act of 1956.

In summary, on the direct appeal by Delta, the judgment of the chancery court, which reversed and set aside the order of the Public Service Commission, is reversed. The order of the Commission is reinstated and affirmed. Appellees' cross appeal on the jurisdictional issue is without merit. Hence on the cross appeal the case is affirmed.

ON DIRECT APPEAL, REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED: ON CROSS APPEAL, AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX "B"

No. 42,480

IN THE SUPREME COURT OF MISSISSIPPI
CAPITAL ELECTRIC POWER ASSOCIATION

Vs.

MISSISSIPPI POWER & LIGHT COMPANY AND CITY OF CLINTON, MISSISSIPPI, ET AL.

KYLE, JUSTICE:

This case is before us on appeal by Capital Electric Power Association from a decree of the Chancery Court of the First Judicial District of Hinds County, reversing a cease and desist order issued by the Mississippi Public Service Commission on July 6, 1961, upon the petition of Capital Electric, ordering that Mississippi Power & Light Company cease and desist from rendering electric serv-

ice or street lighting service in an area recently annexed to the City of Clinton, which had been certificated to Capital Electric by the Public Service Commission.

The record shows that Capital Electric Power Association is a Mississippi Corporation organized and existing under authority of the Electric Power Association Act of 1936, Miss. Laws 1936, Ch. 184; Miss. Laws, 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is a public utility engaged in the transmission and distribution of electricity for lighting, heating and power purposes, and is vested with authority to operate electric services both in and without municipalities. Code Sec. 5473(8). It has the power of eminent domain. Sec. 5474 (16) (14). Capital Electric operates in parts of seven counties in the central part of the state, including the area lying east of the City of Clinton in Hinds County, and is obligated to render nondiscriminatory service to all persons living in its service areas who apply for such service.

The area involved in this controversy is an area approximately 1/4 mile wide, east and west, and 1/2 mile long, north and south, lying immediately east of the corporate limits of the City as the same existed prior to March 25, 1960. The area is bounded on the north by the right of way line of Clinton Boulevard, on the west side by the city limits as they existed prior to March 25, 1960, and on the south by old U.S. Highway No. 80, and on the east by the north-south half section line running through Section 28, Township 6 North, Range 1 West. The area is referred to in the record and in the briefs filed on this appeal as the "disputed area"; and will be referred to by us in the same manner.

The record shows that Capital Electric began to furnish electric service to persons desiring such service in

the disputed area in 1944, and has continued to serve all persons applying for such service since that time. Lines have been added as needed. Such service was being furnished to 14 subscribers, including residential, church and commercial, at the time of the hearing of this cause. Neither Mississippi Power & Light Company nor any other electric utility had ever furnished electric service to subscribers in the area prior to the annexation of the area by the City of Clinton on March 25, 1960, except residents of two dwelling houses located on the extreme northern edge for which electric service had been provided by the Company for two of its employees prior to the enactment of Ch. 372, Laws of 1956, and which were "frozen" by agreement of the parties and an order of the Public Service Commission dated September 21, 1959.

The record shows that, after the enactment of the Public Utility Act, Ch. 372, Laws of 1956, which became effective March 29, 1956, Capital Electric filed with the Public Service Commission under authority of paragraph (b) of Section 5 of the Act, commonly called the "grandfather" clause, its application for a certificate of public convenience and necessity authorizing it to continue its operations as a public utility serving the designated areas which were being served by it on the effective date of the Act. The application was entered upon the docket of the Commission as Docket No. U-84. Mississippi Power & Light Company was made a party to the proceeding. After extended negotiations between Capital Electric and the Company for the settlement of area claims, the Commission, by an order entered in Docket No. U-84 on September 21, 1959, granted to Capital Electric a certificate of public convenience and necessity, covering the areas which were being served by it on the effective date of the Act, including the area involved in this controversy. The

area certificated to Capital Electric as its service area was described in the order of the Commission by metes and bounds and included the area involved in this controversy. No petition for a rehearing was filed, and no appeal was taken from the final order of the Commission in that matter; and thereafter Capital Electric continued to furnish electric service to its subscribers in the area. The record shows that Capital Electric does not have and has never had a municipal franchise in the City of Clinton. It does not have and has never had a street lighting agreement with the City of Clinton. However, the record shows that a written offer was made by Capital Electric to the City on August 23, 1960, to furnish street lighting service to the City in the disputed area on the same terms as such service was being rendered by Mississippi Power & Light Company.

The record shows that the appellee, Mississippi Power & Light Company, hereinafter referred to as the Company, is an investor-owned public utility incorporated under the laws of the State of Florida and qualified to do business in the State of Mississippi. All of its property is located in the western half of the state. Its general offices are located in the City of Jackson. The Company has operated in Mississippi since 1924. Its current franchise, authorizing the use of the streets, highways and public places in the City of Clinton, was granted by the City on December 6, 1946, for a period of 25 years. On December 16, 1946, the governing authorities of the municipality approved an exclusive street lighting contract with the Company, which provided that, "Company will furnish and municipality will take and pay for its entire street lighting service during the term of this agreement." The contract had been in effect continuously from December 16, 1946, to the date of the hearing.

On November 25, 1959, the Public Service Commission, in Docket No. U-44, granted to the Company a "grandfather" certificate of public convenience and necessity, pursuant to the provisions of paragraph (b) of Section 5, of the Public Utility Act, covering numerous areas in various parts of the state, including the area lying within the corporate limits of the City of Clinton, but not including the area involved in this controversy which at that time was not a part of the City. As in the case of Capital Electric, the Company's "grandfather" certificate described the service areas of the utility by metes and bounds.

The events leading up to the filing by Capital Electric of its petition against the Company in this cause asking for a cease and desist order were substantially as follows: The decree of the Chancery Court of the First Judicial District of Hinds County, approving the extension of the city limits of the City of Clinton so as to include within the City the area involved in this controversy, along with certain other small areas lying outside of the City, became final on March 25, 1960. On May 3, 1960, the mayor and board of aldermen of the City adopted a resolution authorizing the mayor and clerk to execute in behalf of the City a supplemental agreement with the Company for the furnishing of street lighting in the newly annexed territory. The city clerk thereupon addressed a letter to the Company's manager designating certain locations for new street lights to be installed by the Company on Morrison Drive, and on May 16, 1960, the Company's workmen entered the disputed area and erected a distribution line covering a distance of 1775 feet. The line entered the disputed area on the north at the intersection of the south right of way line of Clinton Boulevard and Morrison Drive and ran in a southerly direction along Morrison Drive

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to the north right of way line of U.S. Highway 80. The line was built immediately across the street from Capital Electric's line and duplicated Capital Electric's line. The Company also installed five street lights, four of which were located directly across the street from street lights already provided by Capital Electric, which were then in operation. The Company also installed a permanent service line into the newly constructed residence of C. M. Kelley, where Capital Electric Service was already being used for construction purposes.

On May 25, 1960, Capital Electric filed its petition in this cause with the Public Service Commission and asked that, upon the hearing of the petition, the Commission enter an order directing the Company to remove the line so constructed by it in the disputed area, and directing that the Company cease and desist offering its service to service locations or constructing service facilities within the disputed area. Capital Electric also asked for general relief.

The Company filed its answer to the petition on July 22, 1960. In its answer the Company admitted that on May 16, 1960, it had built the line in question within the disputed area, and that it had served the owner of one residence from that line and had also installed along Morrison Drive five street lights. As matters of affirmative defense, the Company alleged that it was operating under a franchise from the City of Clinton dated December 16, 1946, which was a 25-year franchise and that the rights and obligations conferred by the City upon the Company by that franchise were protected by Ch. 372, Laws of 1956, and particularly by paragraph (g) of Section 5 thereof. The Company further alleged that it was the only supplier of electric energy operating in the City or any part thereof

to which a franchise had been granted by the City, and that it was paying the City two per cent of its domestic and commercial receipts derived from its operations within the City. It alleged that Capital Electric had applied to the City for a franchise, and that the mayor and board of aldermen had refused to grant the same.

The Company further alleged that it had received on November 25, 1959, in Cause No. U-44, a "grandfather" certificate to serve the City of Clinton, pursuant to Section 5(b) of the Public Utility Act; that it had an exclusive street lighting contract with the City under which it was presently operating; that its right to furnish electric service in the area which had been incorporated into the city was protected by the due process clause and equal protection clause of the Constitution of the United States and the due process clause of the Mississippi Constitution. The Company alleged that it had offered to purchase from Capital Electric, or to trade with Capital Electric for other facilities located elsewhere, all facilities which Capital Electric had in the City of Clinton. The Company incorporated in its answer a cross petition in which it asked that Capital Electric be ordered to cease and desist from maintaining its electric distribution service in the disputed area, and to remove its equipment and distribution facilities from the area.

The Mississippi Municipal Association filed a petition asking that it be permitted to intervene on behalf of the municipalities of the state as parties interested in the litigation. The City of Clinton also filed a petition asking that it be permitted to intervene as an interested party. Both petitions were granted by orders of the Commission dated September 16, 1960. The Municipal Association then filed its answer to the petition of Capital Electric; and

the City of Clinton filed an answer and cross-petition in which it averred that Capital Electric had no right to continue to operate its facilities in the disputed area after March 25, 1960, for the reason that it had never been granted a franchise to operate within the City.

Extended hearings were held by the Public Service Commission on the issues presented by the pleadings. The hearings were concluded on February 27, 1961. The Commission took the case under advisement, and on July 6, 1961, the Commission rendered its decision in favor of Capital Electric and entered a cease and desist order as prayed for in Capital Electric's petition. The relief prayed for in the cross petitions filed by Mississippi Power & Light Company and the City of Clinton was denied, and the cross petitions were dismissed.

The Commission in its order found that Capital Electric had been granted a certificate of convenience and necessity by the Commission in Docket No. U-84 on September 21, 1959, which authorized it to continue to operate its electric facilities and serve the needs of electric consumers in the area that it was serving on March 29, 1956, the effective date of the Public Utility Act; that the certificate of convenience and necessity contained a particular description of the area involved in this litigation; and that continuously, since March 29, 1956, Capital Electric had been rendering reasonably adequate electric service within the area. The Commission found that the new facilities constructed by Mississippi Power & Light Company in the disputed area were within the areas specifically certificated to Capital Electric by the Commission in Docket No. U-84; and that the Company, unless ordered to cease and desist therefrom, would offer and render electric service to consumers of electric power within the

disputed area, and would continue to render street lighting service within the area; that the real issue in the controversy was whether or not the holder of a certificate of convenience and necessity issued by the Commission was entitled to be protected against an invasion of its certificated area by the construction and operation of electric facilities therein by another electric utility which did not have a certificate authorizing it to serve the area. The Commission was of the opinion that the municipal franchise granted to the Company by the City of Clinton was not germane to any of the issues in the cause and had no bearing on the case. The Commission did not pass upon the validity of the franchise or attempt to construe its provisions.

The Commission, by an order duly entered upon its minutes, ordered that the respondent, Mississippi Power & Light Company, cease and desist from rendering any electric distribution service or street lighting service in the disputed area, and that the Company remove "all of its electric lines and facilities, which it has constructed and is now operating and maintaining within the disputed area," within a period of 30 days from the date of the order. In its order the Commission stated that its decision was based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket Nos. U-44 and U-84; that the first certificate did not include the disputed area; that the second certificate did include the area in question. From that order the respondent, Mississippi Power & Light Company, prosecuted an appeal to the Chancery Court of the First Judicial District of Hinds County. The City of Clinton and the Mississippi Municipal Association likewise prosecuted appeals.

The cause was heard by the chancery court as an intermediate court of appeals upon the voluminous record made during the hearing before the Commission, and on April 20, 1962, that court entered a judgment reversing the order of the Public Service Commission and ordering that the petition of Capital Electric for a cease and desist order be dismissed. The court was of the opinion that the order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton; that, when the City of Clinton extended its corporate limits and annexed adjoining areas which included the disputed area in this cause the certificate of convenience and necessity granted to Capital Electric under the Public Utility Act of 1956, in so far as it covered the disputed area, became ineffective and Capital Electric could not operate within the corporate limits of the City inasmuch as it had not been granted a franchise by the City. The cause is now before us on appeal by Capital Electric from the judgment entered by the chancery court reversing the order of the Commission.

The attorneys for Capital Electric have assigned and argued four main points as ground for reversal of the judgment of the lower court:

(1) That the court erred in holding that when the City of Clinton expanded its corporate limits on March 25, 1960, and annexed the disputed area, the certificate of public convenience and necessity theretofore issued by the Public Service Commission to Capital Electric, under and pursuant to Section 5(b) of the Public Utility Act of 1956, became ineffective in so far as it covered the disputed area; (2) that the court erred in holding that the expansion of the corporate limits of the City of Clinton on March 25, 1960, destroyed the vested service rights acquired by Capital Electric by virtue of its having served

the disputed area for many years prior to that date, which rights had been recognized and expressly reserved and granted to Capital Electric by the terms of the Public Utility Act itself; (3) that the court erred in holding that Capital Electric was barred of its right to operate within the disputed area after the annexation by the City for the reason that Capital Electric had not been granted a municipal franchise by the City; (4) that the court erred in its holding that the cease and desist order of the Commission issued on July 6, 1961, was erroneous in law and violative of the statutory rights of Mississippi Power & Light Company and the City of Clinton.

It is argued on behalf of the appellees in support of the judgment of the lower court that the statutes of Mississippi in unmistakable terms, have given to municipalities complete jurisdiction of streets and the absolute right to regulate by franchise the use which can be made of the streets by public utilities; that the power to determine what utilities may operate within and use the streets and public ways of a municipality is definitely vested in the municipality by Sections 3374-119 and 3371-120, and Section 3374-73, Miss. Code of 1942, Rec.; and that only those acquiring and holding a franchise from the municipality itself can operate a utility therein. It is also argued on behalf of the appellees that it clearly appears from the language used in paragraph (g) of Section 5 of the Public Utility Act that it was the legislative intent that a utility should not be permitted to operate within a municipality without first obtaining a franchise from the municipality; that Capital Electric had not been granted a franchise by the City of Clinton, and for that reason the chancery court was eminently correct in its holding that Capital Electric should no longer be permitted to operate in the disputed area since the area had been annexed to and made a part of the City.

The questions of law presented for our decision on this appeal are substantially the same as the questions presented in Delta Electric Power Association v. Mississippi Power & Light Co., et al., Cause No. 42,535, decided by this Court on February 11, 1963. There is no substantial dispute as to the facts in this case, and on the questions of law the opinion rendered in the Delta Electric Power Association Case is controlling here. We think there was error in the court's holding that the cease and desist order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton. We also think that there was error in its holding that the extension of the corporate limits of the City of Clinton so as to include the disputed area within the City rendered ineffective as to that area the certificate of convenience and necessity granted to Capital Electric under authority of paragraph (b) of Section 5 of the Public Utility Act, and in its holding that Capital Electric was barred of its right to operate within the disputed area after its annexation to the City without first obtaining a franchise from the City.

As stated by the Court in the opinion rendered in the Delta Electric Power Association Case, prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of "grandfather" certificates under Section 5 are made on an area rather than a facility basis; and (2) a certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts. Capital Electric Power Association v. Mississippi Power & Light Co., 240 Miss. 139, 125 So.2d 739; Mississippi Power Co., et al. v. East Mississippi Electric Power Association and Public Service Commission (Miss. 1962), 140 So.2d 286.

In Capital Electric Power Association v. Mississippi Power & Light Co., supra, which is generally referred to as the "Elton Case," the Court, in discussing the nature of the right acquired by Capital Electric by virtue of the certificate of convenience and necessity issued to it under paragraph (b) of Section 5 of the Public Utility Act, said: "Capital Electric Power Association is a corporation chartered and operated under Chapter 184, Laws of 1936, Section 5463 et seq., Code of 1942. It is obligated to render nondiscriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor. Capital Electric Power Ass'n. v. McGuffee, 226 Miss. 227, 83 So.2d 837, 84 So.2d 793, 56 A.L.R. 2d 403. Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right is indeed a valuable one. 'A non-exclusive franchise is a valuable right which can be protected in the courts.'"

In the Delta Electric Power Association case, the court had under consideration the effect of the annexation by the City of Winona of an area lying west of the City, which constituted a part of the service area certificated to Delta Electric by the Public Service Commission and which the Company claimed under a municipal franchise granted by the City many years prior to the annexation; and in its opinion in that case the Court said: "Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate

did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not consistent with the terms of the Act or with the legislative purposes."

What was said in the Delta Electric Power Association case is equally applicable to the facts in this case. The Public Utility Act, in our opinion, is not susceptible of the construction contended for by the appellees and adopted by the lower court, that, when the City of Clinton extended its corporate limits and annexed the disputed area the certificate of convenience and necessity granted to Capital Electric under paragraph (b) of Section 5 of the Act, in so far as it covered the disputed area, became ineffective. If the legislature had intended that awards by the Commission of service areas under the "grandfather" clause of Section 5 of the Act should be only tentative and subject to change in the event a portion of the certificated area lying outside of a municipality on the effective date of the Act should be thereafter incorporated in a municipality, the legislature in our opinion would have expressly provided for such change and for payment of compensation to the utility whose rights were adversely affected.

As to the appellees' contention that paragraph (g) of Section 5 of the Public Utility Act indicates a legislative intent that a utility shall be required to obtain a franchise from the municipality before operating therein, we think that contention has been fully answered in the opinion rendered in the Delta Electric Power Association case.

There is nothing in paragraph (g) of Section 5 to indicate that a utility which has obtained and is operating under a certificate of convenience and necessity issued by the Commission shall have its certificate revoked in whole or in part, or shall be required to apply for another certificate of convenience and necessity, if a part of its certificated area is later incorporated into a municipality.

It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal constitutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, par. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case.

For the reasons stated above the judgment of the lower court, which reversed and set aside the order of the Public Service Commission, is reversed; and the order of the Public Service Commission is reinstated and affirmed.

REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX "C"

An Ordinance

Granting an Electric Franchise to Mississippi Power & Light Company, its Successors and Assigns, in the City of Winona, Fixing the Terms Thereof, Prescribing the Obligations Thereasto, and for Other Purposes.

BE IT ORDAINED By the Mayor and Board of Aldermen of the City of Winona, Mississippi, lawfully assembled:

SECTION 1. In consideration of the benefits that will accrue to the municipality and the inhabitants thereof, Mississippi Power & Light Company, a corporation, (hereinafter called Grantee) is hereby vested with full right, authority, easements, privileges and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain, operate and conduct in said municipality a plant or plants and a system for the manufacture or distribution of electric current for all purposes whatsoever, for a term of twenty-five years from date of passage.

SECTION 2. The Grantee is hereby further given and vested with full right, authority, easements, privilege and franchise to construct, re-construct, erect, suspend, install, renew, maintain, operate and conduct in said municipality a system of poles, towers, conduits, cables, conductors, transformers, fittings, and all appliances and appurtenances now, or hereafter, during the life of this franchise, necessary or desirable to the transmission, distribution, and or sale of electric current, for all purposes whatsoever, in, over, under, along, upon and across all streets, alleys, ways, bridges and public places and other

municipal property in said municipality, as they now exist, or may hereafter be laid out or extended, together with the further full right, privilege, easement, authority and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain and operate said poles, towers, conduits, cables, conductors, transformers, fittings and all other appliances and appurtenances now or hereafter, during the life of this franchise, necessary or desirable for the transmission within, through and over and beyond said municipality, and to electricity consumers, both within and beyond the limits thereof, electricity for lighting, heating, power and all other purposes for which electricity may be now, or hereafter used, and for the purpose of extending its system beyond the limits of the municipality as they now may, or may hereafter exist.

SECTION 3. The poles, towers, conduits, cable conductors, transformers, fittings, appliances and appurtenances, whether now in use or hereafter devised, shall be constructed so as not to unreasonably interfere with the proper use of the streets, avenues, alleys, ways, bridges, public places and grounds in said municipality, the municipality to approve location of same, and same shall be moved at expense of Grantee when necessary for paving, and shall be maintained in a reasonably safe condition and repair.

SECTION 4. Grantee may, from time to time, declare, make and enforce reasonable rules and regulations as a condition for the sale or distribution of electric current by it to the municipality, or any consumer therein or thereabouts during the life of franchise.

SECTION 5. In the event the supply of electric energy should be interrupted or fail by reason of accident, or otherwise, beyond the control of Grantee, the Grantee

shall restore the service within a reasonable time, and such interruptions shall not constitute a breach of this franchise, nor shall the Grantee be liable for damage by reason of such interruptions or failure.

SECTION 6. Grantee will pay to the municipality a sum of money equal to two per cent (2%) of the receipts of the Grantee from the sale of electric service at retail for residential and commercial purposes (sales tax excluded) within the corporate limits of the municipality as shown by Grantee's billing records, such payments to be due quarterly and the annual aggregate amount of such payments shall not be less than $100. Provided, however, the obligation to make said payment is conditional in that the full amount specified shall be paid during the term of this franchise unless and except should there be collected by the municipality from the Grantee any new taxes of any nature whatsoever imposed subsequent to the date of this franchise, or should there be an increase in the rates of any taxes now being collected by the municipality (except advalorem taxes now authorized by law), then the payment herein provided to be made by the Grantee to the municipality will be decreased by such amount.

SECTION 7. The Mayor and Clerk are authorized to execute, upon the part of the municipality, all requisite contracts with Grantee which have been approved by the Mayor and Board of Aldermen.

SECTION 8. The Clerk shall publish this ordinance according to the requirements of law, as soon as practicable after the passage hereof, and Grantee shall pay to said Clerk any and all costs and expenses of such publication.

SECTION 9. If any clause or section of this ordinance is illegal, or is not embraced within the title hereof,

or is not cognate to the subject expressed in the title, the remaining provisions hereof shall not be thereby affected, but shall have full force and effect.

SECTION 10. This ordinance shall take effect from and after its passage; but Grantee shall not be bound hereby if within 30 days from and after this date it declines in writing to accept this grant. The foregoing ordinance was reduced to writing and proposed and introduced by Alderman W. S. Gerard, and was read, considered and voted upon by sections and as a whole; the vote on each and all of the sections, and upon the ordinance as an entirety, was taken by "yea" and "nay" vote, those voting "yea" being as follows: Aldermen J. E. Allen, Kennedy Bryan, W. S. Gerard, E. A. Hammond, and James L. Shelton, and those voting "nay" being: Aldermen: None, ..., and was adopted on this the 23rd day of February, 1948.

/s/ J. M. Lamb
Mayor

ATTEST:

/s/ E. A. Hammond
Clerk

SEAL

Street Lighting Agreement

Between

Municipality of Winona, Mississippi

and

MISSISSIPPI POWER & LIGHT COMPANY

THIS AGREEMENT made and entered into this the 23rd day of February, 1948, by and between the Municipality of Winona, Mississippi, a municipal corporation, here-

inafter called "Municipality", and MISSISSIPPI POWER & LIGHT COMPANY, hereinafter called "Company"

WITNESSETH:

In consideration of the mutual covenants contained herein it is agreed as follows:

1. Company will furnish and Municipality will take and pay for its entire street lighting service during the term of this Agreement in accordance with Rate Schedule SL-4 &, attached hereto and made a part hereof.

SL-5

2. The service to be furnished as of the date of this Agreement consists of the following equipment:

A. Owned and Maintained by Company

(1) Overhead Street Lighting System—

(a) Lamps:

Lumens	Number
1,000	49
2,500	52
4,000	
6,000	
10,000	

(b) Luminaires:

Radial wave reflectors or equivalent	101
Open suburban reflectors	
Small Pendant globe	
Center suspension units	5
Mast arms over 8 ft., no. of ft. over 8	

(c) Wood Poles

(d) Overhead Supply Lines, Circuit Ft. 43,400

(2) Whiteway Street Lighting System—

(a) Lamps:

Lumens	Number
1,000	
2,500	
4,000	
6,000	
10,000	

(b) Luminaires

(c) Standards

(d) Supply Lines:

Overhead, circuit ft.
Underground, circuit ft.

B. Owned and maintained by Municipality except that Company shall furnish and replace lamps—

No. of Fixtures	Size of Lamp	No. Lamps per Fixture
19	2500 Lumens	One

3. Additional street lighting service other than as provided herein requiring the installation of additional facilities shall be by a supplementary agreement in writing and approved by an authorized official of the Municipality and an authorized official of the Company.

4. Payments are to be made by Municipality on or before the 10th day of each month for service rendered during the preceding month, and in case of failure to pay on or before that time, service may be discontinued by Company without terminating this contract, or waiving or impairing any of the right accruing to Company hereunder.

5. The Company shall use reasonable diligence to furnish continuous service hereunder but shall not be liable to the Municipality, or its inhabitants for failure to deliver service hereunder for causes reasonably beyond its control.

6. The term of this Agreement shall be for five years from and after the date hereof and shall be automatically extended for a period of five years from each expiration date of such time, or any automatic extension thereof, unless and until either party shall notify the other in writing not less than 180 days nor more than 360 days prior to any expiration date of its intention to terminate this Agreement.

7. This Agreement is subject to approval of Company's Vice-President.

Executed in triplicate original on the day and year first above mentioned.

MISSISSIPPI POWER & LIGHT COMPANY
By /s/ W. W. Williams

APPROVED:

/s/ R. B. Wilson
Vice-President

MUNICIPALITY OF Winona, MISSISSIPPI
By /s/ J. M. Lamb
Mayor

ATTEST:

/s/ E. W. Hammond
Clerk

SEAL

APPENDIX "D"

Section 3375, *Mississippi Code of 1942*:

> "The corporate name of a city shall be 'The city of . . .'; of a town, 'The town of . . .'; and of a village, 'The village of . . .'; (filling the blank in each case with the name by which the place is commonly known); and by such name may sue and be sued and suits against any municipality shall be instituted in the county in which such municipality is situated where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one county; and in a case where a county has two judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located; and in cases where a municipality is located in two counties, such suits shall be brought in the county in which the principal office of the municipality is located; and as to justice of the peace actions, the same shall be brought in the justice district in which the municipality or its principal office is located. And such municipalities may contract and be contracted with and exercise and perform all municipal powers and duties."

Section 3374-02, *Recompiled Mississippi Code of 1942*:

> "The corporate name of a city shall be 'The City of . . .'; of a town, 'The town of . . .'; and of a village, 'The village of . . .'; (filling the blank in each case with the name by which such municipality has been legally designated); and by such name may sue and be sued, and suits against any municipality shall be instituted in the county in which such municipality is situated, where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one county; and in a case where a county has two judicial districts, such suits shall be brought in the judicial district in which

the municipality or its principal office is located; and in cases where a municipality is located in two counties, such suits shall be brought in the county in which the principal office of the municipality is located; and as to justice of the peace actions, the same shall be brought in the justice district in which the municipality or its principal office is located. And such municipalities may contract and be contracted with and exercise and perform all municipal powers and duties."

Section 3376, *Mississippi Code of 1942*:

"The limits and boundaries of the existing cities, towns and villages, shall remain as now established until altered, as herein provided: To enlarge or contract the boundaries of a city or town or village by adding thereto adjacent unincorporated territory, or excluding therefrom any part of the incorporated territory of such municipality, it shall be necessary for the municipal authorities to pass an ordinance defining with certainty the territory which it is proposed to include in or exclude from the corporate limits and also defining the entire boundary as changed. Any two or more cities or towns situated and being adjacent or sufficiently near each other may combine into and become one municipality, in which event it shall be necessary for the municipal boards of mayor and aldermen of each of said municipalities so proposed to unite into one municipality to pass an ordinance at a regular meeting of said boards declaring the intention of the said city or town to unite with such municipality, or municipalities, as it is proposed to combine into one municipality, defining with certainty the name of the municipality that shall be formed and the territory which it includes when so formed, and the entire boundary thereof, provided that the provisions of this section shall not apply to towns or villages with a population of less than three hundred, unless the territory which it is proposed to add to and include in the corporate limits of such towns or villages

shall have been surveyed and platted into lots and blocks, and a map thereof duly recorded, and unless four-fifths of the property owners of said territory shall petition the municipal authorities of such towns or villages to add such territory to and include the same in the corporate limits of such towns or villages; and no cities or towns shall combine into one municipality where their present corporate limits are more than three miles apart."

Section 3374-10, *Recompiled Mississippi Code of 1942*:

"The limits and boundaries of existing cities, towns and villages shall remain as now established until altered in the manner hereinafter provided. When any municipality shall desire to enlarge or contract the boundaries thereof by adding thereto adjacent unincorporated territory or excluding therefrom any part of the incorporated territory of such municipality, the governing authorities of such municipality shall pass an ordinance defining with certainty the territory which it is proposed to include in or exclude from the corporate limits, and also defining the entire boundary as changed. In the event the municipality desires to enlarge such boundaries, such ordinance shall in general terms describe the proposed improvements to be made in the annexed territory and the manner and extent of such improvements and the approximate time within which such improvements are to be made, and such ordinance shall also contain a statement of the municipal or public services which such municipality proposes to render in such annexed territory. In the event the municipality shall desire to contract its boundaries, such ordinance shall contain a statement of the reasons for such contraction and a statement showing whereby the public convenience and necessity would be served thereby."

Section 7716-01, et seq., *Recompiled Mississippi Code of 1942*, the Public Utility Act of 1956, especially Sections 7716-05, 7716-05(b) and 7716-38:

"No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D(3) of section 1 (§7716-01), of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

"(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

"(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or

maps on file with the Mississippi Public Service Commission on the effective date of this act.

"(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

"(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regula-

tion therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

"(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1D(1) and 1D(2) (§7716-01) and in the case of a utility defined in 1D(3) (§7716-01) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation

or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

"(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

"(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 (this section) hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with

or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

"In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned, the utility obtaining said certificate of convenience and necessity shall not be required to pay to said municipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

"In the case of a public utility as defined in section 1D(3) (§7716-01) which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided."

Section 7716-38:

"Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights ac-

cruing, accrued or established prior to the effective date of this act."

Section 88, *Mississippi Constitution of 1890*:

"The legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment."

Section 2780, *Recompiled Mississippi Code of 1942*:

"All companies, associations of persons, municipalities, associations of municipalities, or natural gas districts, incorporated or organized for the purpose of building or constructing pipe lines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipe lines and appliances along or across highways, waters, railroads, canals, and public lands, above or below grounds, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals and public lands. The board of supervisors of any county through which any such line may pass, shall have the power to regulate, within their respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county and all such companies, associations of persons, municipalities, associations of municipalities or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof."